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NO. 94-

94-8842

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LAURENCE M. POWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
APR 12 1995
OFFICE OF THE CLERK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. **Should Certiorari be granted to vindicate the integrity of the United States jury system, by holding that admitted government misconduct which has a substantial likelihood of inflaming the passions of the jury requires reversal in light of other factors in the argument, and the other circumstances of this case, including the relationship of the misconduct to overwhelming external pressures on the jury?**

2. **Did the Government's use of the video taped testimony of co-defendant Briseno from a prior trial violate petitioner's right of confrontation, where that co-defendant did not testify in this trial and where the district court found that the core of the complaint in the prior trial was assault and battery, and the core of the present case was the violation of civil rights, and where, since the time of the prior trial, the government has created new evidence bearing directly upon the credibility of the non-testifying co-defendant?**

3. **Did jury instructions approved in the Ninth circuit, and given in this case, defining the elements of a violation of 18 U.S.C. § 242 [Willful Deprivation of civil rights], unconstitutionally relieve the government of the burden of proving a necessary element of the crime -- the mens rea -- that the act which violated the victim's rights be willful, and done with the requisite specific intent to violate those rights?**

4. **Should Certiorari be granted to resolve a sharp conflict in the Circuits in the essential approach to reviewing departures under the United States Sentencing Guidelines, and in the correct analysis of the particular categories of downward departure involved in this case?**[1]

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[1] Combination of non-prohibited factors vs. "appropriate" factors; Victim provocation that precipitates an *immediate* response vs. victim provocation that substantially contributes to the danger presented, or is an extended course of conduct.

NO. 94-

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, LAURENCE M. POWELL, respectfully prays that a writ of certiorari issue to review the decision of a panel of the United States Court of Appeals, Ninth Circuit, affirming his conviction[2] and reversing his sentence and remanding for re-sentencing. He was convicted of violating Title 18 United States Code, Section 242, and sentenced to 30 months in federal prison.

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[2] Petitioner appealed from the judgment of conviction only. In a cross-appeal, the Government appealed the sentence, contending the district court erroneously determined the injury was "bodily injury" but not "great bodily injury"; and contending the district court erroneously departed (downward) from the applicable guideline sentence.

OPINION(S) BELOW

The opinion of the circuit court appears in the official reports at 34 F.3d 1416. On January 12, 1995 the Circuit Court denied rehearing and rejected a suggestion for rehearing *en banc*. Two dissenting opinions, dissenting from the denial of rehearing *en banc*, which were joined in by a total of nine judges of the Circuit court, were filed and appear at 45 F.3d 1303 as amended. The opinions of the panel, affirming the convictions, and reversing the sentence, as well as both dissenting opinions are reproduced in the Appendix.[3] The appeal was consolidated with the appeal of Petitioner's co-defendant, Stacey Koon. To the extent applicable, Petitioner POWELL adopts and incorporates by this reference the arguments raised in the Petition for Writ of Certiorari on file, or to be filed herein on behalf of Stacey Koon, in this matter.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The judgment of the district court was rendered on August 4, 1993. The circuit court opinion was filed on August 19, 1994. A petition for rehearing and suggestion for rehearing *en banc* was timely filed, and the order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was filed on January 12, 1995. This Petition is timely filed pursuant to Rule 13.4 of the Supreme Court rules.

[3] In the proceeding below Laurence M. Powell, Petitioner herein, appeared as defendant, appellant and cross-appellee; the United States of America appeared as plaintiff, appellee, and cross-appellant.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the due process clause of the Fifth, and Sixth, and Fourteenth Amendments to the United States Constitution, the Federal Rules of Evidence, the Federal Rules of Criminal Procedure, and the United States Sentencing Guidelines.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner seeks Certiorari to review the circuit court's rejection of several of the arguments he raised on appeal, and its determination that an additional error he alleged, although present, was harmless. In addition, Petitioner seeks review and reversal of the circuit court's judgment (on the Government's cross-appeal) reversing the sentence.

Rodney King was speeding and evading arrest and led pursuing officers in a chase during which he failed to yield for a prolonged period of time. When he was stopped, he did not obey commands given to him by police officers and he was generally uncooperative.

Several officers on the scene drew firearms in response to the situation, and a large number of police officers were eventually assembled. The person in charge of the encounter was Sergeant Stacey Koon, one of the appellants in this appeal.

Mr. King was ordered to the ground, but only partially complied, going down to his hands and knees. His resistance to police commands and efforts to cuff him then began. King did not obey commands issued to him by Sgt. STACEY KOON, Petitioner LAURENCE POWELL or Officer TIMOTHY WIND, and he rose up while being cuffed and POWELL and

other officers fell or were thrown off him.

KOON used a police taser in an effort to temporarily disable King. After shooting two taser darts at him, King appeared to be shaken for a moment, but then was able to shake the effects of the taser off. He then arose and charged at or near Petitioner, Officer POWELL. As King approached him, POWELL struck King with a baton. It was disputed where that baton blow landed, on the upper body, or the face or head.

In the next 60 or so seconds, POWELL and WIND administered numerous baton blows. The Government's experts contended, generally, that these blows were unjustified, while the defense expert said each use of force (baton blow, or kick, etc.) was justified by a movement or refusal of King to comply or submit.

The Government introduced the infamous Holliday video tape which captured the last minute and 28 seconds of these events.

Over strenuous defense objection, on rebuttal, the government introduced an excerpt of the video taped trial testimony from the prior state trial of the case, the "Simi Valley trial" of one of the four officer's on trial, Theodore J. Briseno. This prior testimony included accusations that POWELL hit King in the head with his baton. Briseno, generally, condemned the use of force by POWELL.

In surrebuttal, the defense established that a "registered video" was much clearer than the Holliday video, that it coincides with defense evidence that the blow to King during his "charge" at or near POWELL was not to the face or head. The registered video was not available in the Simi Valley trial.

Petitioner testified that he believed the force he used was necessary and lawful in light of the facts Mr. King had charged at him after being tased, he was an unsearched felony suspect, and he continued to resist and get up in a threatening manner despite police commands to submit to arrest.

The jury was instructed that to convict they must find five elements, including *both* that the use of force was unreasonable, *and* that the application of unreasonable force was "willful." Nevertheless, given the language the jury was instructed in, and the prosecutor's argument to the jury, it is likely that the intent element of this crime was misunderstood by the jury, and that the "unreasonable" use of force element was unconstitutionally applied.

The Court instructed the jury that to be "willful," a violation of Rodney King's civil rights must be with "a specific intent to use more force than is reasonable under all the circumstances," but it also told the jury:

> "It is not necessary for you to find that a defendant was thinking in constitutional terms at the time. You may find that a defendant acted with the required specific intent, even if you find he had no real familiarity with the constitution or with the particular right involved, provided you find that the defendant intended to accomplish that which the Constitution forbids. The government may meet its burden, even if the defendant was motivated by fear, anger or some other emotion . . ."

The court also said:

> "The term 'willfully' as used in these instructions to describe the alleged state of mind of a defendant means that he knowingly acted or failed to act deliberately and intentionally as contrasted with accidently, carelessly or unintentionally."

In arguing to the jury, the prosecutor said, among other things:

> "It is not, I repeat it is not, what these defendant's think was reasonable. It is what a reasonable and ordinary police officer thinks is reasonable that is the standard you must employ."

During the final summation to the jury the prosecutor said the "real question" the jury was to answer was:

> "Which of these two officers[4] would you want teaching recruits how much force can be used against the citizens of this community? That's the real question, and you know the answer."

Under the guise of emphasizing that one or more of the police officers present lied about whether King was down on the ground when baton blows were delivered, the prosecutor improperly discussed and then emphasized, world wide "horror and outrage" at seeing the Holliday video tape.

> ". . . [T]here was one thing that everyone from Paris to Tokyo noticed, one thing that everyone saw. There was one thing that caused horror and outrage throughout this world. There was one thing that neither you nor anyone else missed when they saw that video tape. Even if they saw it for five or ten seconds. And the thing that everyone saw, that everybody was so outraged about was that the defendants were beating a man who was on the ground. That's why there was such outrage. That's why there was such uproar."

Finally, after playing the last 50 seconds of the video tape, he concluded his argument with:

> ". . . and you will leave with your collective good common sense, because ladies and gentlemen of the jury, you're the conscious (sic) of the community. You decide what conduct is acceptable by your police. And what conduct violates the law."
>
> * * *
>
> "There are some countries where people can be beaten by the police until they beg the police to stop, but not in this country. Not now, not 200 years ago when this Constitution was written, and with your decision, not ever."

On appeal, the Government conceded and the panel below found that the "Paris to Tokyo" remark was prosecutorial misconduct.

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[4] The Government's use of force expert, Sgt. Mark Conta, or the defense use of force expert, Sgt. Charles Duke.

Despite the fact a higher sentence would have been lawful under the United States Sentencing Guidelines, the District Court departed downward from the applicable Guideline range, and sentenced the petitioner to 30 months in prison, based on the victim's provocation, additional punishment defendants have and would suffer by reason of their status and notoriety in prison, the fact the defendants would face an administrative proceeding for the identical conduct, and the fact the defendants had already been subjected to a state prosecution for the same conduct, their extreme vulnerability in prison.[5] The Government appealed the downward departure.

The Circuit court affirmed the conviction and reversed the sentence, holding the District Court erred in departing downward on any and all theories.

SUMMARY OF ARGUMENT

1. Despite authoritative decisions of this Court, the panel below erroneously concluded that admitted misconduct by the Government in argument did not constitute "plain error" even though it acknowledged that the arguments "went beyond the bounds of appropriate advocacy and were improper" and despite the finding by the panel the "prosecutor's reference to public outrage could easily incite the passions, fears and prejudices of the jurors, remind them of the social ramifications of their verdict, and persuade them to convict the defendants for reasons irrelevant to appellant's guilt." (Issue I below).

[5] After finding the defendant inflicted bodily injury, the Court departed downward 8 levels. Five were based on the Court's application of U.S.S.G., Section 5K2.10 (VICTIM PROVOCATION) and three levels on the combination of other factors.

2. Petitioner was deprived of a meaningful opportunity to confront and cross-examine his co-defendant, Briseno, whose prior testimony from the former state trial was tape recorded and played for the federal jury, because between the two trials, substantial new evidence was created by the Government which seriously questioned the thrust of that prior testimony, and the Government chose to prosecute the defendants (and resisted motions to sever) such that Briseno would be unavailable to Petitioner to call and cross-examine, or confront with that new evidence. (Issue II below)

3. Jury instructions approved in the Ninth circuit, and given in this case defining the elements of a violation of 18 U.S.C. 242 [Deprivation of civil rights] unconstitutionally relieve the Government of the burden of proving a necessary element of the crime -- the mens rea -- that the act which violated the victim's rights be willful, and done with the requisite specific intent.

The jury was told *it* determined whether the victim was deprived of a constitutional right, by virtue of an objective standard. If the jury found the amount of force was, objectively, unreasonable under the circumstances, then it was a violation of the defendant's civil rights. The jury was further told that to be guilty the defendant must have wilfully deprived the victim of civil rights, but that this was proven if the defendant "knowingly acted or failed to act" and "even if [they] find he had no real familiarity with the constitution or with the particular right involved", so long as the thing he intended to do was that which the constitution forbids.[6] The

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[6] The Ninth Circuit panel that affirmed the conviction noted that "it may appear paradoxical to say both that a defendant must have the specific intent to violate the Constitution and that the defendant may have this intent even if he is not 'thinking in constitutional terms'. It found this to be explained however by concluding that "willfulness" includes "reckless disregard of a (continued...)

jury was never told that to be criminal, the deprivation of rights must be inflicted with the purpose of depriving the victim of rights or of violating the constitution, which is what *Screws* v. *United States, supra,* held the jury must be told. Rather, this jury was told the act of inflicting force must be intentional, and the amount of force inflicted must be, objectively, unreasonable. Then the defendant is guilty, ***even if the defendant subjectively believed his actions were lawful, and reasonable.*** The prosecutor underscored this interpretation of the instructions in his argument when he told the jury "it is not, I repeat it is not, what these defendant's think was reasonable" and later told the jury that they "decide what conduct is acceptable by your police and what conduct violates the law."

4. The opinion of the Ninth Circuit reversing the sentence in this case on the ground that the District Judge erred in departing downward creates a sharp conflict in the Circuits[7] on the basic role of the Court in fixing the sentence under the United States Sentencing Guidelines.[8] The panel opinion below conflicts in the essential approach to reviewing departures with the

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[6](...continued)
constitutional right that has been made specific and definite." The court below quoted from a prior Ninth Circuit opinion, in *United States* v. *Reese*, 2 F.3d 870, 881 (9th Cir. 1993), quoting from *Screws* v. *United States*, 325 U.S. 91, 89 L.Ed.2d 1495, 65 S.Ct. 1031 (1945). In fact, in its discussion of "willfulness" *Screws* talks about "reckless disregard" of the criminal statute prohibiting violation of constitutional rights. ["He is under no necessity of guessing whether *the statute* applies to him (cite omitted) for he either knows or acts in reckless disregard of *its* prohibition of the deprivation of a defined constitutional or other federal right." (Italic supplied.)] The reference "to statute" is clearly to s. 20, not to the constitutional right involved.

[7] And a conflict with the prior decisions of the Ninth Circuit.

[8] This case is an excellent vehicle for resolving this issue in light of its national notoriety, and the fact that the District Judge, the Honorable John Davies wrote a scholarly and extensively documented **SENTENCING MEMORANDUM**, in which he analyzed the evidence and found the facts of the case relative to the sentence. That SENTENCING MEMORANDUM is published at 833 F.Supp. 769, and was before the Circuit Court on appeal.

highly respected opinion of (then) Chief Judge Breyer, in *United States* v. *Rivera*, 994 F.2d 942, 952 (1st Cir. 1993), and in the correct analysis of the particular categories of downward departure[9] with *both United States* v. *Rivera*, *supra*, and *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). A forceful and convincing dissent from the denial of rehearing *en banc*, concurred in by nine respected active members of the Ninth Circuit Court of Appeals, persuasively argues that the correct overall approach to departures under the Guidelines is that found in *United States* v. *Rivera*, *supra*, and that under any well reasoned approach the District Court's downward departure to a 30 month prison sentence in this case was lawful. Petitioner seeks Certiorari to resolve these conflicts and seeks the establishment of an approach to guide all District Courts in departing under the Guidelines.[10] (Issue 4 below)

REASONS FOR GRANTING THE WRIT AND ARGUMENT

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1. **Certiorari should be granted to vindicate the integrity of the United States jury system, by holding that admitted government misconduct which has a substantial likelihood of inflaming the passions of the jury requires reversal in light of other factors in the argument, and the other circumstances of this case, including the relationship of the misconduct to overwhelming external pressures on the jury.**

The panel opinion erroneously concluded that admitted misconduct by the Government in argument did not constitute "plain error." (Slip Op. p. 9406).

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[9] Combination of non-prohibited factors vs. "appropriate" factors; Victim provocation that precipitates an *immediate* response vs. victim provocation that substantially contributes to the danger presented, or is an extended course of conduct.

[10] A subject of great nationwide concern on which this Court has never expressed an authoritative view.

The comments employed by the prosecutor here placed on the jury the burden of (1) dictating the way they want the police taught in the future; (2) denying the validity of the "horror and outrage" expressed from "Paris to Tokyo"; (3) being the "conscience of" the Los Angeles "community" in light of the riots in that community that followed the acquittals in Simi Valley; (4) deciding not just this case, but what conduct is acceptable by "their" police; (5) deciding what conduct "violates" the law; and (6) determining by their verdict whether the Constitution (as the prosecutor has depicted it) will survive, has been condemned as egregious misconduct that deprives the defendant of a fair trial and requires reversal.[11]

Remarkably, after citing the test for plain error as "a highly prejudicial error affecting substantial rights"[12] the court below found that the prosecutor's argument to the jury in this case that:

> ". . . [T]here was one thing that everyone from Paris to Tokyo noticed, one thing that everyone saw. There was one thing that caused horror and outrage throughout this world. There was one thing that neither you nor anyone else missed when they saw that video tape. Even if they saw it for five or ten seconds. And the thing that everyone saw, that everybody was so outraged about was that the defendants were beating a man who was on the ground. That's why there was such outrage. That's why there was such uproar."

was not plain error.

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[11] *Berger* v. *United States*, 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935) ["The United States Attorney . . . may prosecute with vigor -- indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (295 U.S. at 88-89, 55 S.Ct. at 633.)]; *Viereck* v. *United States*, 318 U.S. 236, 247-48, 87 L.Ed. 734, 63 S.Ct. 561, 566 (1943) [held the comments of the prosecutor, which appeal to the national or patriotic community interest of the jury prejudiced the petitioner's right to a fair trial].

[12] Citing *United States* v. *Dischner*, 974 F.2d 1502, 1515 [a case involving alleged jury instructional error]. (Slip Op. pp. 9401-9402).

This is all the more remarkable since the panel clearly found the remarks to be misconduct, and further, explicitly found they "went beyond the bounds of appropriate advocacy and were improper."

More importantly, the panel found the "prosecutor's reference to public outrage *could easily*" incite the passions, fears and prejudices of the jurors, remind them of the social ramifications of their verdict, and persuade them to convict the defendants for reasons irrelevant to appellant's guilt.

Somehow, however, the panel went on to conclude that although this argument "could easily" ... "persuade them [the jurors] to convict the defendants for reasons irrelevant to defendant's guilt" the jury did not do so.

Three reasons were given. (1) The remarks were isolated in a trial that lasted over a month and in an argument that lasted several hours; (2) The jury was admonished to decide the case on the evidence and not on the ramifications of the verdict; (3) There was substantial *independent* evidence to support a finding of guilt. But none of these reasons withstands scrutiny in the context of this case.

Isolation of improper, prejudicial remarks that could persuade jurors to convict for "irrelevant reasons" or incite the passions, fears and prejudices of the jurors is not a valid basis for finding that the remarks are not highly prejudicial.[13] In fact, it cannot be gainsaid that the

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[13] In this first reason, the panel included: (a) The remarks were not part of a series of improper comments; (b) were made in response to defense arguments; (c) the phrase "Paris to Tokyo" was a phrase used by the defense first. The panel concluded on p. 9407 of the Slip Opinion, "The misconduct was partially invited, isolated, and of limited severity." This conclusion is either nonsense, or not supported by reference to the record. While the misconduct was made as a part of a response to a defense argument, the offending remark was (continued...)

jurors in *this* case, like those in the District of Columbia case cited by appellant, where the D.C. Circuit held raising the specter of marshall law constituted a prejudicial appeal to passion in view of the context of social unrest of the 1960's. There a black man was charged with assault on a police officer. *Brown* v. *United States*, 370 F.2d 242 (D.C. Cir. 1966). Moreover, this conclusion brings this Circuit in conflict with the conclusion of the Eighth Circuit, which said in *United States* v. *Johnson*, 968 F.2d 768, 771 (8th Cir. 1992), "a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated." Petitioner can hardly imagine a remark more destructive to his right to a fair trial that persuades the jury to convict him for irrelevant reasons, *and* inflames their passions, incites their emotions, and prejudices, and reminds them of the social or political ramifications of their verdict, *in light of the recent historical context of this trial.*[14]

Nor does the jury admonition to decide the case on the evidence overcome misconduct that persuade[s] the jury to decide it on irrelevant matter. This conclusion seems self-evident.

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[13](...continued)
not responsive to in. Although the court concludes the remark was not a part of a series of *improper* comments, appellant has in his briefs set out several other remarks which could, *in the context of the pre trial riots, and this improper remark,* have had an improper purpose and effect. The phrase "Paris to Tokyo" was not improperly used by the defense as it was by the prosecution, and simply using the same form of words that opposing counsel used, as part of an improper comment in no way excuses the impropriety. Finally, the term "of limited severity" is a nonsense term in this situation. Of course all impropriety is of "limited" severity. But the term "limited" is so non-quantified that it has no meaning here. The Court cannot say it was barely sever, in light of its own findings of what the remark could "easily" do. (Slip Op., p. 9406).

[14] The jurors' knowledge of that riot-torn recent history was also acknowledged by th panel, which wrote: "In this case, the worldwide broadcast of the Holliday videotape and the acquittal of appellants by the Simi Valley jury sparked widespread rioting and the general public outrage of which the jury could not help but be aware. (Slip Op. 9406)

Moreover, the authority cited below for this second reason for finding the misconduct not prejudicial does not support application of that reason to this case. In *United States* v. *Flake*, 746 F.2d 535, 542 (9th Cir. 1984) *cert. denied*, 469 U.S. 1225 (1985), e.g., the admonition was given as to a particular improper comment of the prosecutor, not general and as a part of the overall charge to the jury, as here.[15] *United States* v. *Lester*, 749 F.2d 1288, 1301 does not involve a situation in which an admonition was held to cure misconduct at all. Rather the court noted in passing, during a discussion of alleged misconduct, that improprieties are not reversible unless they are prejudicial and not neutralized by the trial judge. The case does not stand for the proposition that general admonitions can cure the kind of impropriety the panel found the government committed here. Finally, *United States* v. *Williams*, 989 F.2d 1061 is nothing more than another opinion written by the author of the panel opinion in this case saying that in light of the isolated nature of the prosecutor's improper comment, and in light of the general admonition, it did not affect the ability of the jury to weigh the evidence. Assuming that case was correctly decided, the prosecutor's comment there was far less egregious than the comment condemned here,[16] and the context of the argument was vastly different.[17]

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[15] Here there would not have been an admonition even if there had been a contemporaneous objection, since the District Court erroneously concluded (on the motion for new trial) that this remark was not improper. Obviously had an objection been made at the time, he would have overruled it, not given a pin-pointed admonition that it should be disregarded as the District Judge did in *United States* v. *Flake*, *supra*.

[16] The prosecutor threw the defendant's car keys, and exhorted the jury to "tell George Allen to take his keys back to Denver, and tell these defendants we do not want crack in Montana." (989 F.2d at p. 1072). While the remarks were colorful, and did have a certain parochial appeal, they did not ask the jury to convict even if they did not think the defendants had 'crack' which was the gravamen of the charge against them. In short, the remark, while improper, could not persuade the jury to convict on the basis of irrelevant matters.

Nor does the strength of the evidence in this case justify the panel's conclusion, since the same evidence was available in the Simi Valley trial, and no convictions were obtained.[18] The panel opinion and the government admitted that the remark of the prosecutor was improper. The panel also admitted it could result in a verdict of guilt NOT based on the evidence.

This Court should issue Certiorari to re-affirm that the decisions of juries in the Courts of the United States are not subject to public opinion even when it is a view held from "Paris to Tokyo."

If here, in one of the most watched examples of the manner in which the United States government prosecutes criminal cases, its attorneys are seen to obtain a verdict of guilty by telling the jury, drawn from a riot-torn community, that they are the "conscience of that community", and that their verdict will determine how the conduct of the police of their city will be judged in the future, and finally, that they hold the future meaning of the U.S. Constitution in their hands, the tactic will be seen as both severely "egregious" and to have created a "miscarriage of justice." For obviously, justice is denied when the process by which a verdict

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[17](...continued)

[17] Other than the world wide crisis associated with drug use and abuse, there was no local history in Montana that could approach the kind of atmosphere that existed in Los Angeles prior to and during the federal trial in this case. To imply that the two situations are alike is either myopic, or is a "category" mistake. The difference between the concern local jurors might have for a growing drug problem, to the extreme awareness the record in this case discloses these jurors had of the explosive, deadly rioting that followed the Simi Valley verdicts is not merely a difference in degree, but a difference in kind.

[18] Nor does the fact that the jury convicted two defendants, while acquitting two, show the grossly improper remarks of the prosecutor did not affect the jury's ability to weigh the evidence. In light of the fact that *none* of the defendants were convicted in the state trial, and the ensuing riots, this jury may easily have been persuaded to convict one or two defendants precisely in order to appease the community, for exactly the irrelevant reasons the panel's opinion acknowledged the misconduct could persuade them to rely on.

is obtained is grossly improper, just as when the perceivably wrong result is obtained.

With this backdrop, these improper comments exhorted the jury to convict the defendants in order to protect community values, preserve civil order, protect the constitution, and deter future lawbreaking. Invoking these considerations, which have great impact on perceptions and emotions, as reasons to convict, could only have affected the verdict, and could only have been designed to affect it.[19] These comments are more egregious than those resulting in reversal in *Brown* v. *United States*, 370 F.2d 242 (D.C. Cir. 1966)[20] and the language of the D.C. Circuit in *United States* v. *Monaghan*, 741 F.2d 1434 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985) is particularly *apropos*.

> "A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear. (741 F.2d at 1441).

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[19] In *Viereck* this Court framed the issue in terms of both the purpose *and the effect* of the comments, holding in light of contemporaneous events, which had great impact on the emotions and perceptions of jurors, that the questioned remarks "could only have . . . arouse[d] passions and prejudice." (*Viereck* v. *United States*, 318 U.S. at 247, 63 S.Ct. at 566.)

[20] In *Brown* an African-American youth was charged with assault on two police officers. During closing argument the prosecutor warned the jury that to acquit would leave the police powerless to protect themselves and citizens against assault short of resort to martial law. The Court found this remark to be wholly irrelevant to any facts or issues in the case (370 F.2d at 246), and further stated that raising the specter of marshall law constituted an especially flagrant and reprehensible appeal to passion and prejudice in the context of current events (i.e. the social unrest of the late 1960's.)

Although there was no contemporaneous objection to these remarks, the record establishes that such an objection would have been useless.[21] Moreover, even if this misconduct, collectively, is judged by the plain error standard,[22] it requires reversal in light of the authorities in which less damning misconduct was held prejudicial and violative of the due process right to a fair trial.[23] Nor is this a case of overwhelming evidence.[24]

The "prosecutor's use of illegitimate means to obtain a verdict" has brought "his office and our system of justice into disrepute"[25] in this case in which the entire world is indeed watching to see how our system of justice works. This Court is urged to resist the invitation that seduced the jury below, to sacrifice these defendants' due process right to a fair trial on the altar of declaring to everyone from "Paris to Tokyo" that it disapproves of the police conduct in this case, or of declaring by its ruling in this case how the police should be taught in the future. Neither this Court, nor the trial jury should act as the conscience of the community *rather than* arbiters of the law and facts. Given the evidence of the prosecutor's summation and

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[21] Petitioner did raise the question of the prosecutor's exhortation to the jury that they were the "conscience of the community" as misconduct in his new trial motion, and the trial judge ruled it was not misconduct. As such, any contemporaneous objection would have left the record the same as it is now -- without an admonition.

[22] *United States* v. *Williams*, 990 F.2d 507, 511-112 (9th Cir. 1993).

[23] Cf., *United States* v. *Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991); *Brown* v. *United States*, *supra*, 370 F.2d at 246; *Viereck* v. *United States*, *supra*, 318 U.S. at 247-8; *United States* v. *Johnson*, 968 F.2d 768, 771 (8th Cir. 1992) ["a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated."].

[24] The strength of the case is relevant. (*United States* v. *Schuller*, 813 F.2d 978, 982 (9th Cir. 1987) [finding error prejudicial "in light of prior hung jury"]. Here the prior acquittals and hung jury, together with the split verdict show the case was not overwhelming, despite the Holiday video tape.

[25] *Commonwealth* v. *Mendiola*, 976 F.2d 475, 487 (9th Cir. 1992) ["A prosecutor's use of illegitimate means to obtain a verdict brings his office and our system of justice into disrepute."]

the relative strength (or weakness) of this case,[26] the law requires reversal of this conviction under either the harmless error or plain error standard.

Under the prior decisions of this Court, the misconduct, which would not have been ameliorated, even if a timely objection had been made, is the type of plain error that requires a new trial free of such error.

2. **The Government's use of the video taped testimony of co-defendant Briseno from a prior trial violated Petitioner's right of confrontation, where that co-defendant did not testify in this trial and where the District Court found that the core of the complaint in the prior trial was assault and battery, and the core of the present case was the violation of civil rights, and where since the time of the prior trial, the government has created new evidence bearing directly upon the credibility of the non-testifying co-defendant, whose prior testimony is being offered?**

The confrontation issue in this case is stated as follows:

> Did the introduction of the "former testimony" of a co-defendant, which included "expert" opinion [as to the propriety of what he observed] aspects, as well as eyewitness lay opinions [about what it was that he was seeing] violate the other defendant's right of confrontation where they could not confront him at the prior trial with new scientific evidence (available in the present trial) which would force him to recant, or reconsider *both* his opinion of what he was seeing, *and* his opinion of whether it was proper police procedure?[27]

The question is not whether the right of confrontation was violated in the former proceedings, but whether it would be violated in the present proceeding, in the context of the factual issues presented at the time the former testimony is offered. *United States* v. *Wingate*,

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[26] Where the case is "not strong" prejudice from improper argument is "highly probable." *Commonwealth* v. *Mendiola*, *supra*, 976 F.2d 475, 487; *United States* v. *Schuller*, *supra*, 813 F.2d 978, 982.

[27] Indeed, in a Motion submitted to the Panel, appellants included a transcript of Briseno's later testimony in which he did precisely that: he said that based on the new enhancements of the Holliday video tape he saw he was wrong about what he was seeing, and that in light of his "enhanced" perceptions he no longer thinks the conduct of appellants was improper.

520 F.2d 309 (2d Cir. 1975), *cert. denied* 423 U.S. 1074, 47 L.Ed.2d 84, 96 S.Ct. 858 (1976).)[28] See also, *United States* v. *Miller*, 904 F.2d 65, 68 (D.C. Cir. 1990); 2 *McCormack on Evidence* § 304, at 315 (4th ed. 1992); 5 *Wigmore on Evidence* § 1387, at 91 (Chadbourne rev. 1974)[29]; 2 Steven A. Saltzburg & Michael M. Martin, *Federal Rules of Evidence Manual* 400 (5th ed. 1990)[30]; 11 J. Moore, H. Bendix, *Moore's Federal Practice* § 804.04[3], p. VII 266 (2d ed. 1989)[31] and see *United States* v. *Salerno*, 937 F.2d 797 (2d Cir. 1991)[32] and Fed.R.Evid. 804 advisory committee's note, 56 F.R.D. 183 (1972)[33]

The panel opinion states that it focused on whether the video tape of Briseno's state court

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[28] "The issues in the two proceedings [must be] sufficiently similar to assure that the opposing party had a *meaningful opportunity to cross-examine* when the testimony was first offered." (520 F.2d at 316).

[29] "The issue on the occasion when the former testimony or deposition was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested for cross examination *upon the point now in issue.*" (And see *Id.*, § 1386 stating that the requirement of an identity of issues in to ensure that the cross-examination in the two proceedings would have been directed at the same material points. [5 Wigmore, § 1386, at 90.]).

[30] "The way to determine whether or not motives are similar is to look at the similarity of the issues *and the context in which the opportunity for examination previously arose.*"

[31] The court will search for some identity of issues in order to determine whether a similar motive to develop the testimony "existed at the time of the elicitation of the former testimony."

[32] Stating that the similarity of motive requirement assures "that the earlier treatment of the witness is the rough equivalent of what the party against whom the statement is offered would do at trial if the witness were available to be examined by that party." (937 F.2d at 806).

[33] In determining similarity of motive the court should look first to what examination *in fact* occurred at the prior proceeding in order to determine whether the prior examination was "the equivalent of what would now be done if the opportunity [to examine] were presented." (56 F.R.D. at 323.)

testimony[34] was admissible under Federal Rules of Evidence, Rule 804(b)(1) in deciding if appellant is correct that his rights of confrontation were violated by its admission. This is a matter of syllogistic logic for the panel.[35] But, the confrontation issue in this case is more complicated than the simplistic analysis suggested by the syllogism.

Relying on a footnote in *Thomas* v. *Cardwell*, 626 F.2d 1375, 1386 n.34 (9th Cir. 1980) the panel concluded that the mere discovery of new evidence which discredits the former testimony of an unavailable witness "does not make the opportunity for cross-examination ineffective..." But as the opinion below itself admits, the *Thomas* v. *Cardwell* analysis was under circumstances where "there was no suggestion that the defendant's failure to discover the

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[34] It contained Briseno's opinions and what he said was his "recollections" and "observations" of the actual encounter between appellant POWELL, co-defendant WIND, and King. In particular, he testified that he believed he saw appellant POWELL strike King in the face during a point in the Holliday video that was blurry, in which it was not possible to tell what was being shown. In addition, Briseno's former testimony was to the effect that he saw appellant POWELL and defendant WIND strike King when he was not moving or posing any threat to, or assaulting them. He further stated that he could not see anything to justify the beating King was receiving, and he did not understand how the Sergeant (appellant KOON) could have permitted it, or have continued to order the baton blows given what he saw.

[35] This "focus" is dictated, the opinion contends by dint of a straight forward syllogism:
[Maj. Premise]: When a hearsay declarant is unavailable to testify at trial, his out-of-court statements may be admitted without violating the Confrontation Clause so long as those statements bear sufficient indicia of reliability. (citing *Bourjaily* v. *United States*, 483 U.S. 171 (1987).)
[Maj. Premise]: No independent inquiry into reliability is required under the Confrontation clause, however, when the out-of-court statements fall within a firmly rooted hearsay exception to the hearsay rule. (citing *Bourjaily* v. *United States*, 483 U.S. 171, 183.)
[Min. Premise]: The former testimony hearsay exception in Rule 804(b)(1) is a "firmly rooted exception." (citing *Mattox* v. *United States*, 156 U.S. 237 (1895).)
[Conclusion]: The tape recorded testimony of the Simi Valley trial of Briseno, who was unavailable in this federal trail did not violate the confrontation clause if it was admissible under the rule.

information was the prosecution's fault" (Opinion, p. 9367).

Here, on the other hand, the Government *chose* to jointly charge and try Briseno[36] and thereafter to resist appellant's motion to sever. Obviously, the government was well aware of the value (to the defense) of the new "enhancements" in contesting Briseno's Simi Valley trial, and yet made no effort to prosecute the officers in this case in a manner that would allow the jury to hear what Briseno has to say in light of the evidence which did not exist when he testified in Simi Valley. Instead the government resisted defense motions to sever the trial of the defendants, and told the jury that Briseno's opinion was that appellants were "out of control" despite their concession in the District Court his opinions should be edited out of the tape, and despite their knowledge that he may have changed his view based on the new "enhanced" evidence. In these circumstances, the inability of appellants to cross-examine Briseno on the basis of evidence likely to change *both* his opinion of what he saw appellant's do, and his opinion that it was improper, violated appellant's right of confrontation and to a meaningful opportunity to cross-examine Briseno. His testimony was allowed to go to the jury in a false light that prejudiced appellants.

In *People of Guam* v. *Hayes*, 1993 WL 469357 (D. Guam Oct.12, 1993) as here, the district court was confronted by a second trial in which new evidence changed the calculus of cross-examination in a way that was significant. Here, too, the government must admit Briseno's testimony was pivotal, and perhaps dispositive as to the verdict against appellants.[37]

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[36] Who was, ironically, fully acquitted in *both* the state and federal trials.

[37] Consider the reliance placed on it by the government in argument, and in cross-examining appellant Koon.

This fact alone makes changes in the evidence of what happened "extraordinary" enough to prevent a routine application of the former testimony rule to allow his state trial evidence to be received. Under these circumstances, petitioner was deprived of a meaningful opportunity to cross-examine Briseno, on whose testimony the government relied to convict petitioner. The denial of the right of confrontation requires reversal.

Certiorari should be granted to establish that where, as here, the government makes a witness unavailable after new evidence bearing on the core credibility of that witness's prior testimony is created or discovered, such prior testimony cannot be offered against a criminal defendant without violating his right to meaningfully confront and cross-examine the witness.[38] Here, the use of Briseno's former testimony without affording petitioner an opportunity to cross-examine him on the basis of critical evidence obtained, created, and discovered since the Simi Valley trial violated petitioner's Sixth Amendment right of confrontation.

3. **Jury instructions approved in the Ninth circuit, and given in this case defining the elements of a violation of 18 U.S.C. 242 [Deprivation of civil rights] unconstitutionally relieved the government of the burden of proving a necessary element of the crime -- the mens rea -- that the act which violated the victim's rights be willful, and done with the requisite specific intent.**

The District Court gave jury instructions using language and standards from this court's decision of *Graham* v. *Connor*, 490 U.S. 386, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989), in advising them of the elements of, and standard for convicting a police officer of violating Title 18 U.S.C. § 242. These instructions were later approved in *United States* v. *Reese*, *supra*, 2

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[38] The right of confrontation guarantees an opportunity for effective cross-examination, is satisfied where the defendant has a *full and fair opportunity* to bring out the witness' bad memory and other facts tending to discredit his testimony. Cf. *Delaware* v. *Fensterer*, 474 U.S. 15, 88 L.Ed.2d 15, 106 S.Ct. 292 (1985), *United States* v. *Owens*, 484 U.S. 554, 98 L.Ed.2d 951, 108 S.Ct. 838 (1988).

F.3d 870, 881, construing this court's decision in *Screws* v. *United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed.2d 1495 (1945).[39]

In particular, the jury in this case was instructed that to convict they must find five elements, including *both* that the use of force was unreasonable, *and* that the application of unreasonable force was "willful." Nevertheless, given the language the jury was instructed in, and the prosecutor's argument to the jury, it is likely that the intent element of this crime was misunderstood by the jury, and that the "unreasonable" use of force element was unconstitutionally applied.

The "willful" element - The Court instructed the jury that to be "willful," a violation of Rodney King's civil rights must be with "a specific intent to use more force than is reasonable under all the circumstances." It also told the jury:

> "It is not necessary for you to find that a defendant was thinking in constitutional terms at the time. You may find that a defendant acted with the required specific intent, even if you find he had no real familiarity with the constitution or with the particular right involved, provided you find that the defendant intended to accomplish that which the Constitution forbids. The government may meet its burden, even if the defendant was motivated by fear, anger or some other emotion . . ."

The court also said:

> "The term 'willfully' as used in these instructions to describe the alleged state of mind of a defendant means that he knowingly acted or failed to act deliberately and intentionally as contrasted with accidently, carelessly or unintentionally."

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[39] *Reese*, *supra*, also relied upon the decisions in *Williams* v. *United States*, 341 U.S. 97, 95 L.Ed.2d 774, 71 S.Ct. 576 (1951); *United States* v. *Guest*, 383 U.S. 745, 16 L.Ed.2d 239, 86 S.Ct. 1170 (1966); *United States* v. *Price*, 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966) and *Anderson* v. *United States*, 417 U.S. 211, 41 L.Ed.2d 20, 94 S.Ct. 2253 (1974).

Clearly, the defense presented in this case was that the force used against Mr. King was motivated by reasonable (even if mistaken) fear on the part of petitioner (Powell), and an honest (even if mistaken) belief that the force was necessary to accomplish the arrest of King, who was never submissive to the police orders, and who was an unsearched felony suspect at the time he ran at Petitioner, and thereafter continued to rise up and buck the officers trying to subdue him.

These instructions have the effect of making the crime described in Section 242 of Title 18 a strict liability crime. Once the prosecution proves that, objectively, the amount of force used was unreasonable within the meaning of the Fourth Amendment, the volitional infliction of that force is equated with a specific intent to violate the victims constitutional rights, and a willful violation of the law.

But this is precisely what this Court held to be an improper interpretation of willful conduct in *Screws* v. *United States*, *supra*, 325 U.S. 91, 103-104.

Taken together, these instructions did not require the government to prove an element of the crime, but allowed the jury to convict if it found that an application of force that was a "volitional act" (i.e., not done by accident or while unconscious) was objectively unreasonable, regardless of what was in Petitioner POWELL's mind at the time. Here is what the prosecutor said to the jury in his final summation:

> "It is not, I repeat it is not, what these defendant's think was reasonable. It is what a reasonable and ordinary police officer thinks is reasonable that is the standard you must employ."

Of course, if officer POWELL thought his use of force was reasonable, he could not, as a matter of law, have specifically intended to use unreasonable force. Here, the jury was led to believe that no intent beyond the bare volition to do whatever act turns out to be

objectively unreasonable, is required.

The "specific intent" element is vacuous if it requires only that the act by which unreasonable force is applied be a "volitional act" because no criminal intent would then be required.

Since it is reasonably possible that the jury's understanding was the defendant did not have to specifically intend to use excessive force, the verdict violates due process and requires reversal under *Estelle* v. *McGuire*, 502 U.S. -, 116 L.Ed.2d 385, 112 S.Ct. - (1991) (and cases cited therein).

The prosecutor also told the jury: "You decide what conduct is acceptable by your police. And what conduct violates the law." And he told them that the real question the jury was to answer [by their verdict] was how future police officers would be taught -- whether they should be taught that they should use their baton to beat suspects into submission. This interpretation of the jury's duty created a reasonable probability that the jury understood it was to convict appellants if they "later hold" it deprived King of his civil rights. In other words, by leading the jury to believe it could *establish* the standard by its verdict, the conviction became a violation of due process and the ex post facto clause.[40]

Telling the jurors to disregard what the defendant thought was reasonable and to use their verdict to tell the police department how to train future police in the use of the baton, and to determine in general what conduct is (objectively) reasonable for the police to engage in, asks them to completely disregard the intent element of this crime. It allowed the jury to say, even

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[40] *Screws* v. *United States*, *supra*, 325 U.S. at 97, 65 S.Ct. at 1033. [Holding that it would be unconstitutional if the law punished an officer for "an act which some court later holds deprives a person of due process."] (See also *United States* v. *Reese*, *supra*, 2 F.3rd at 880.)

if the officer honestly believed he was using, and intended to use only reasonable force, if we the jury, objectively, think the force he used was unreasonable, that is sufficient to convict him. Petitioner POWELL's good faith (but erroneous) belief that his use of force was reasonable became irrelevant to the jury's decision whether to convict him, and the failure of the Court to ensure he could not be convicted if he did, in good faith, honestly believe the force he used was reasonable, (even if it was not, objectively), requires reversal.

Using the "objective" standard from *Graham* combined with the Circuit court's *misreading* of the standard of "willfulness" and "specific intent" found in *Screws* deprived him of due process, and permitted the jury to convict without finding each essential element of the crime to be proven beyond a reasonable doubt.

The focus of the decision in *Graham* [as well as in the case it relied upon, *Tennessee* v. *Garner*, 471 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968)] is the standard under which a civil claim against a law enforcement for excessive force is to be judged. This Court also noted that the question was whether the force used was "reasonable" and that a proper application of the Fourth Amendment standard requires attention to the facts of the case, including "whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396, 104 L.Ed.2d at 455. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies.[41]

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[41] The court said reasonableness must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

Because it was a civil claim for damages filed under Section 1983 *against* the officers, the issue there was "whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. (cites omitted)" The issue of jury instructions in a criminal civil rights case was not even considered.

In *United States* v. *Guest*, *supra*, 383 U.S. 745, also relied upon by the Ninth Circuit, the majority opinion authored by Mr. Justice Stewart barely touched on either the *mens rea* of a violation of the criminal civil rights statute,[42] stating only that "the offender must act with a specific intent to interfere with the federal rights in question"[43] and that "[a] specific intent to interfere with the federal right must be proved, and at trial the defendants are entitled to a jury instruction phrased in those terms."[44]

The *Guest* case lends no support to the contention of the government, or the conclusion of the Ninth Circuit, that the specific intent element of a criminal violation of civil rights can be satisfied by *less* than a specific intent to do an act which is known to exceed the lawful power of the agent performing the act. Nor is such a view supported by this Court's opinion in *Anderson* v. *United States*, *supra*, 417 U.S. 211. There Justice Marshall's focus was whether or not an intentional interference with voting rights fell within the statute, where the primary intent was to interfere with local rather than federal elections, although false federal votes were

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[42] There, the crime charged was conspiracy to interfere with civil rights, under 18 U.S.C. § 241.

[43] 383 U.S. at 754, citing *Screws* v. *United States*, *supra*, 325 U.S. 91, and the dissenting opinion in *Williams* v. *United States*, *supra*, 341 U.S. 70, 93-95.

[44] 383 U.S. at 760, again, citing *Screws* v. *United States*, *supra*, 325 U.S. 91, 106-107.

also cast to conceal the false local votes. *Anderson* v. *United States*, *supra*, 417 U.S. at 222-223. The Court never even touched on the question presented here, how the jury must be instructed. It was there said, "since the gravamen of the offense under § 241 is conspiracy, the prosecution must show that the offender acted with a specific intent to interfere with the federal rights in question. See *United States* v. *Guest*, 383 U.S. 745, 753-754 (1966); *Screws* v. *United States*, 325 U.S. 91, 89 L.Ed. 1495, 65 S.Ct. 1031, 162 A.L.R. 1330 (1945)."[45] But this statement appears to add nothing to an understanding of the specific intent or willfulness requirement, or to even have been written with jury instructions in mind. Returning to the specific intent requirement in that case the Court said:

> "The specific intent required under § 241 is not the intent to change the outcome of a federal election, but rather the intent to have false votes cast and thereby to injure the right of all voters in a federal election to express their choice of a candidate and to have their expression of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots." 417 U.S. at 226.[46]

But, when the Court did discuss the question whether the jury was properly instructed on the specific intent requirement, the issue related only to whether the instructions should have stated that a specific intent to cast a false ballot *in a federal election* was required, or if the specific intent to cast a false ballot was sufficient. The Court specifically declined to resolve this issue, despite a pointed dissent on precisely this question.

While is clear that to be guilty of the crime proscribed by Title 18 U.S.C. Section 242, in the context of an accusation of excessive force in the arrest of a suspect, a police officer must

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[45] *Anderson* v. *United States*, *supra*, 417 U.S. at p. 223.

[46] Citing and quoting from *United States* v. *Saylor*, 322 U.S. 385, 88 L.Ed. 1341, 64 S.Ct. 1101 (1944).

actually violate the suspects civil rights, by, e.g., using excessive force,[47] it is also beyond dispute that not all actionable violations at the hands of the police are *ipso facto* criminal violations, in contravention of Section 242.

Rather, the "use of excessive force" [judged by an objective standard], or the "violation of a civil [Fourth Amendment] right" is necessary, but is not, in and of itself, sufficient to establish a violation of the criminal law. If it were otherwise, Section 242 would have created a strict liability crime -- and it is hardly likely that such was the intent of congress.[48]

Under *Screws* v. *United States*, *supra*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed.2d 1495, the instructions in this case allowed the jury to convict without finding the element of willfulness, or specific intent was proven.

In *Screws*, three state law enforcement officers beat a black man to death after transporting him to the jail in handcuffs, claiming he went for a gun when he alighted from the police car. The beating continued for between 15-30 minutes after he fell to the ground until he was unconscious, and he died shortly thereafter. *Screws* v. *United States*, *supra*, 325 U.S. at 92, 65 S.Ct. at 1031, 89 L.Ed. 1495.

The court charged the jury that "due process of law gave one charged with a crime the right to be tried by a jury and sentenced by a court. "On the question of intent it charged that

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[47] Appellant contends that if *Graham* v. *Conner*, *supra*, has any relevance at all to a *criminal* case, it would be to this first element. There must be, objectively, a violation of the civil (or in this case Fourth Amendment) rights of someone. The question arises, however, how can those cases which are criminal violations of civil rights be distinguished from non-criminal violations?

[48] Suffice it to say, Congress would not have been likely to use phrases like "whoever, . . . *willfully subjects* any inhabitant of any state, . . . to the deprivation of any rights . . .." violates the criminal statute.

'* * * if these defendants, without it being necessary to make the arrest effectual or necessary to their own personal protection, beat this man, assaulted him or killed him while he was under arrest, then they would be acting illegally under color of law, as stated by this statute, and would be depriving the prisoner of certain constitutional rights guaranteed to him by the Constitution of the United States and consented to by the State of Georgia.'" *Id.*, 325 U.S. at 93, 65 S.Ct. at 1032.

This Court considered the impact of permitting a conviction to stand where no specific intent need be proven.

> "Under that test a local law enforcement officer violates s. 20 and commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law. And he is a criminal though his motive was pure and though his purpose unrelated to the disregard of any constitutional guarantee. The treacherous ground on which state officials - police, prosecutors, legislators, and judges - would walk is indicated by the character and closeness of decisions of this Court interpreting the due process clause of the Fourteenth Amendment. * * * Those who enforced local law today might not know for many months (and meanwhile could not find out) whether what they did deprived some one of due process of law. The enforcement of a criminal statute so construed would indeed cast law enforcement agencies loose at their own risk on a vast uncharted sea." *Id.*, 325 U.S. at 96-97, 65 S.Ct. at 1033.

Relying on the word "willfully" in the statute, however, the Court held specific intent *is* required to establish the crime of "willfully * * * [causing] deprivation of any right..."[49]

> "But, 'when [willfully is] used in a criminal statute, it generally means an act done with a bad purpose.' *United States* v. *Murdock*, 290 U.S. at page 394, 54 S.Ct. at page 225, 78 L.Ed. 381 . . . In that event something more is required than the doing of the act proscribed by the statute. . . . An evil motive to accomplish that which the statute condemns becomes a constituent element of the

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[49] The statute is a former version of the statute petitioner here were convicted of violating, which reads: "Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights . . . shall be . . . fined or imprisoned not more than ten years. * * *"

crime. (cites omitted). And that issue must be submitted to the jury under appropriate instructions." *Id.*, 325 U.S. at 101, 65 S.Ct. at 1035.

The Court went on to make clear that a the "willful" element is met only by a bad purpose of depriving the victim of a protected right.

> "We repeat that the presence of a bad purpose or evil intent *alone* may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitution-ality on the ground of vagueness. [¶] * * * This requirement is met when a statute prohibits only 'willful' acts in the sense we have explained. One who does act with such specific intent is aware that what he does is precisely that which the statute forbids. He is under no necessity of guessing whether the statute applies to him (See *Connaly* v. *General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322) for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right. See *Gorin* v. *United States*, 312 U.S. 19, 27, 28, 61 S.Ct. 429, 433, 434, 85 L.Ed. 488." *Screws* v. *United States*, 325 U.S. at 103-104, 65 S.Ct. 1036-1037, 89 L.Ed. 1495.

Finally, the Court noted that only when construed in this manner, would the statute avoid the problems inherent in a strict liability crime.

> "The Act would then not become a trap for law enforcement agencies acting in good faith. 'A mind intent on a willful evasion is inconsistent with surprised innocence.' (cite omitted)." *Id.*, 325 U.S. at 104, 65 S.Ct. 1037, 89 L.Ed. 1495.

In the present case the defendants argued they did not intend to use more force than was necessary under the circumstances, but the jury was not instructed that to be guilty they must have intended to do so. Rather, the jury was told that if the in fact use more force than was necessary and, if, further, they intentionally used the force they used, they were guilty. That construction does not comport with the reasoning of *Screws*, or of due process.

Since there is a reasonable probability that the jury interpreted or understood the law in a way to permit it to convict without finding each element of the crime true, or in an

unconstitutional way, the error requires reversal. *Estelle* v. *McGuire*, - U.S. -, 116 L.Ed.2d 385 (1991); *Cupp* v. *Naughton*, 414 U.S. 141, 147, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

4. Certiorari should be granted to resolve a sharp conflict in the Circuits in the essential approach to reviewing departures under the United States Sentencing Guidelines, and in the correct analysis of the particular categories of downward departure involved in this case?

Two departure issues under the United States Sentencing Guidelines are presented by this Petition,[50] and a profound dispute among the Circuits as to the correct overall approach to the issue of departure by District Courts is at stake.

The District Judge here departed 8 levels below the applicable guidelines sentencing range, and made extensive findings of fact based on the record.[51]

At issue is whether the straight-jacketed approach of the panel below should prevail in departure questions, or whether the better reasoned approach of the court in *United States* v. *Rivera*, 994 F.2d 942, 952 (1st Cir. 1993), which recognizes the unique role of the District Court in identifying a case as unique or unusual should govern review of District Court departures (up or down).

Petitioner believes, for the reasons stated in the eloquent opinion of Judge Reinhardt dissenting from the denial of rehearing *en banc* in this case, in which eight other Judges of the Ninth Circuit, representing a broad range of judicial philosophy, concurred, is a persuasive

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[50] Combination of non-prohibited factors vs. "appropriate" factors; Victim provocation that precipitates an *immediate* response vs. victim provocation that substantially contributes to the danger presented, or is an extended course of conduct.

[51] See 833 F.Supp. 789.

argument for (a) this Court to grant Certiorari in this case; and (b) adopting the opinion of Judge Bryer in *United States* v. *Rivera* as stating the correct general approach to departure issues.

A sentencing court may depart from the Guidelines under 18 U.S.C. § 3553(b):

> "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) *unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." [Italics supplied.]

In the case of downward departures, the Courts have rejected efforts by the Government to limit this power of the district court, so long as the district court has evidence of one or more mitigating factors which is not adequately taken into consideration by the Sentencing Commission.

Once the Court has identified one, or more than one, lawful basis for a downward departure, the Court may determine the degree of departure that is appropriate based on *all* the facts and circumstances in the case, whether or not each would justify a departure if considered alone. In *United States* v. *Cook*, 938 F.2d 149 (9th Cir. 1991), the Court of Appeals held that a "unique combination of factors" may constitute a "mitigating circumstance" which would justify a downward departure, even though no single factor would justify a departure when considered alone. *Id.* at 153; *accord United States* v. *Anders*, 956 F.2d 907, 911 (9th Cir. 1992); *United States* v. *Floyd*, 945 F.2d 1096, 1099 (9th Cir. 1991), corrected, 956 F.2d 203 (9th Cir. 1992); see also *United States* v. *Sklar*, 920 F.2d 107, 117 (1st Cir. 1990) ("We do not mean to imply . . . that factors, inadequate to warrant departure when taken in isolation, may not in combination suffice to remove a case from the heartland . . ."). Such a departure may be appropriate when "'a court finds an atypical case,' one 'where conduct significantly differs

from the norm.'" *Cook*, 938 F.2d at 153 (quoting U.S.S.G. Ch. 1, Pt. A, § 4(b)).

As Judge Noonan has cautioned:

> In making a decision in any particular case, good judgment will often require the evaluation of a complex of factors. No single factor may be enough to point to the wise course of decision. But a wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decision. *Cook*, 938 F.2d at 153.

In addition, the facts of this case are an excellent vehicle for resolving the conflict created between the circuits in the interpretation of U.S.S.G. § 5K2.10, relating to victim provocation.

In this case, if the conduct of the victim may be viewed as mitigating, it would appear to be an excellent factor to serve as a basis for departure, precisely because the Guidelines do not include any specific adjustments for victim conduct that is mitigating.

Under the general principles set forth above, then, victim conduct that mitigates the "offense conduct" in this case would appear to fit into the rationale of 18 U.S.C. § 3553(b)[52]:

> ". . . as a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines" (See also U.S.S.G. § 5K2.10 (Policy Statement) [same].)

Since the mitigating circumstance of victim conduct is not "taken into consideration" at all in computing the Guidelines Sentence, it clearly is a legitimate basis for downward departure.

Moreover, the Guidelines Commission specifically authorized downward departure on the basis of victim conduct. U.S.S.G. § 5K2.10 provides:

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[52] "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) *unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." [Italics supplied.]

"If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics in comparison to those of the defendant;
(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;
(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;
(d) the danger actually presented to the defendant by the victim; and
(e) any other relevant conduct by the victim that substantially contributed to the danger presented."

In this case the district court departed on the basis of the fact the Mr. King's wrongful conduct contributed significantly to provoking the offense behavior. The government did not seriously contend that Mr. King's conduct was lawful. The evidence presented at trial established that Mr. King was not merely that of a "disrespectful and obstreperous drunk." He was acting in a manner that far exceeded such benign conduct. In fact, the district court concluded, based on the trial evidence that:

1. Mr. King acted in a dangerous manner in his conduct of recklessly evading detention and arrest by driving at high rates of speed to avoid being stopped at all by the police. This conduct was life threatening.

2. Did not obey police commands to submit to police authority.

3. Resisted lawful arrest to such an extent that (it is undisputed) the police *lawfully* used deadly force, in the form of a taser to subdue him.

4. Even after being tased, he posed a perceived danger to Defendant Powell, by continuing to refuse to obey police commands, by refusing to submit to arrest, and by actively

resisting arrest.[53]

5. During this period, he posed a physical threat to Defendant Powell by getting up and running in his direction. "He then rapidly rose to his hands and knees, and to his feet. He turned, outstretched his arms forward, and charged towards Officer Powell."

All of this conduct was engaged in by a person who was, in fact, a convicted felon, who had not been searched, and who the district court found officers could reasonably believe was on PCP.[54] This wrongful conduct of the victim forms a powerful basis for a downward departure in this case under the factors listed in §5K2.10. Looking at those listed factors in turn, they each support the district court's decision to departure.

The "size and strength" of Mr. King at the time of the offense conduct in this case was referred to by the district court in its findings of fact.[55]

Moreover, another "relevant physical characteristic" in this case includes the fact that he was tased, but could still control his motor functions, get up, and charge Defendant Powell.

At the very least, the reasonable perception of one in Defendant Powell's position would be that Mr. King possessed remarkable physical strength after apparently (at least) being tased by Sgt. Koon.

Again, there is little doubt that in this case Mr. King "persisted" in his dangerous actions. He did not yield during a high speed auto chase, and he continued to resist arrest as police

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[53] "He resisted and became combative, forcing the officers to retreat."

[54] "because of Mr. King's erratic and recalcitrant behavior."

[55] "Mr King was a large muscular man and a felony suspect. Sergeant Koon testified that he thought Mr. King may have been recently imprisoned because Mr. King appeared to have engaged in bodybuilding common among prison inmates."

commands and use of force escalated. Defendant Powell did approach Mr. King to cuff him prior to the point at which Mr. King arose. If he had succeeded in cuffing Mr. King, the confrontation that included the "offense conduct" would have been avoided.

Given the information Defendant Powell had about Mr. King's ability to, and apparent determination to, effectively continue to resist lawful commands of the police both before and after the taser was used, Defendant Powell "reasonably perceived" that he was very dangerous. This perception was, reasonably, heightened by two factors: (i) an objectively reasonable assumption by a police officer in Defendant Powell's position that Mr. King was under the influence of PCP, or some similar stimulant; (ii) Defendant Powell's role in the arrest of Mr. King.[56]

Considering the potential that Mr. King was possessed of chemically enhanced strength and resolve, Defendant Powell could reasonably have perceived his conduct to pose a very serious threat of harm to him and his fellow officers.

Furthermore, considering the fact that when he is acting lawfully, properly, and within L.A.P.D. policy, an officer in Defendant Powell's position is not trained to act unilaterally, but is trained to rely in large measure on information being relayed to him by the Sergeant in charge of the arrest, Defendant Powell would reasonably have perceived Mr. King to be very dangerous indeed, since Sgt. Koon was yelling to him to administer more and more frequent baton blows to Mr. King to subdue him.

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[56] As discussed below, the uncontroverted evidence at trial was that when an unsearched suspect is resisting arrest, it is the responsibility of the ranking officer to take charge of the scene, and it is the responsibility of the officers actually effecting the arrest to rely on information given to them by the officer in charge from a more objective vantage point.

Mr. King was an unsearched felon, on parole, who was willing to endanger lives in order to evade arrest while in his car, who withstood a taser charge, who persisted in disobeying police commands despite the presence of a sizable number of uniformed, armed police officers, who physically resisted arrest, and who was capable and willing to stand up from a prone position and move in the direction of officer Powell.[57]

Mr. King "actually presented" a danger to appellant.

Despite repeated commands to him and the lawful use of the very formidable device of a taser gun, Mr. King refused to comply, or to show his hands, or keep them away from his mid-section where he could have concealed a weapon. Clearly, in the situation confronting the defendants, the lack of knowledge that Mr. King was not armed, and his conduct in preventing the officers from searching him, and preventing the officers from immobilizing his hands (by cuffing, e.g.) substantially contributed to the danger he and his conduct presented.

In addition, his "bizarre" behavior, such as dancing and acting in a boisterous, disrespectful, and obstreperous manner also contributed to the danger he presented *in light of the other facts discussed above.* This conduct by a detainee who was very actively resisting lawful arrest in the early moments of the police encounter would make any person in Defendant Powell's position extremely wary since it made Mr. King appear to be not only dangerous, but especially dangerous because he was unpredictable. He acted in a way that was irrational,[58]

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[57] Again, the district court identified this factor in its Sentencing Memorandum, 833 F.Supp. 769.

[58] If only because he appeared to be willing to resist arrest against great odds of numbers of police officers.

and simply strange.[59]

Such conduct may always be said to be unsettling, but when it is manifested by a man who has already engaged in life threatening behavior (recklessly evading the police), who has also taken a taser jolt and gotten back up on his feet within seconds, this strange conduct would be more than merely unsettling, it would be reason to fear that man as a substantial danger.

Again, Judge Reinhardt's dissent demonstrates that the panel opinion is in error in too narrowly construing the reach of that section which specifically authorizes downward departure on this ground. The panel decision below is directly in conflict on this point with the Eighth Circuit's opinion in *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). There, the court found the victim's behavior which preceded the violent assault of the victim (stabbing) to have justified the district court in departing substantially below the applicable guideline sentence.

In that case the defendant was convicted of stabbing the victim in the chest with a nine inch knife requiring emergency medical attention and hospitalization.

The district court imposed a fifteen month sentence for the crime of assault resulting in life threatening injuries with a dangerous weapon. This was a substantial departure below the applicable guideline range and it was imposed on the basis of the victim's antecedent conduct under U.S.S.G. § 5K2.10 (Policy Statement), which defendant here also relies upon.

While characterizing the victim's conduct as "consensual sexual foreplay" the government appealed the sentence asserting that the district court's departure from the Guidelines was (1) based on clearly erroneous factual findings; (2) based on mitigating factors adequately taken into

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[59] This behavior was so "bizarre" and potentially dangerous that CHP officer Melanie Singer, in the early stages of the encounter with King, found it necessary to draw her weapon.

account by the Guidelines; and (3) unreasonable. (*United States* v. *Yellow Earrings*, *supra*, 891 F.2d 650, 651-652) The Court held:

> "The Government contends that the district court improperly considered victim conduct as a mitigating factor warranting departure. Specifically, the Government contends that the Guidelines permit departure only for wrongful victim conduct and then only to the extent merited by the factors set out in section 5K2.10. According to the Government, Struder's conduct fails to satisfy either criteria. The Government's arguments to this effect border on the frivolous."

The activity that provoked the stabbing in *Yellow Earrings*, *supra*, was not contemporaneous with the crime. Nor did the crime follow immediately after the provocation. Rather, the sexually offensive remarks of the victim were made prior in time to his return to the room where the defendant had armed herself with a large knife, and stabbed him. The government argued there that since the offense was not immediately tied up with the offense, it was not provoked by the conduct within the meaning of U.S.S.G. § 5K2.10. The Eighth Circuit rejected this argument, finding that the offense was provoked by the antecedent activity, even though it had ceased when the crime was occurred. This Court improperly acted as a fact finder in determining that the antecedent behavior of Mr. King did not provoke the criminal activity of the defendant -- despite the District Court's conclusion it did.

In fact, by focusing on a finding of the trial court that at the time of the offense conduct, Mr. King "was no longer resisting arrest...[and] posed no objective threat, and the defendant's had no reasonable perception of danger" (Opinion, p. 9436) the panel opinion looked to the wrong facts. That conclusion is the *only reason* the District Court found the conduct of appellant to be criminal. It does not justify the further conclusion (reached by the panel) that the offense conduct was not provoked within the meaning of § 5K2.10. If Mr. King were resisting arrest or posing an objective threat or reasonable perception of danger, there would

have been no crime at all. No where does the guideline require a "reasonable perception of danger" before a finding of victim provocation is appropriate.

There can be no doubt that the parallels between the cited case and the present case are substantial. The Court in *Yellow Earrings* noted:

> "The above evidence demonstrates that Struder, at the very least, pushed Yellow Earrings, verbally abused her and attempted to publicly humiliate her when she refused his request for sexual intercourse. In addition, Yellow Earring's personal recounting of the incident strongly suggests that had Struder accepted "no" for an answer in a reasonably responsible fashion, his subsequent misfortunes would never have transpired." 891 F.2d at 650.

Clearly, the events that were held "provocative" of the offense conduct, preceded it. Just as clearly, here as in the cited case, the offense conduct flowed from lawful conduct that responded to the victim's improper conduct, and it can be said that if Mr. King had responded to the lawful commands of the officers "in a reasonably responsible fashion, his subsequent misfortunes would never have transpired." This is not an argument that the officer's conduct was excused, but it is one that the panel did not take account of in rejecting the District Court's bases for downward departure, despite the citation of *United States* v. *Yellow Earrings*, *supra*, by the District Court and appellants.

Disparate conclusions among the circuits concerning the proper role of departure under the United States Sentencing Guidelines cries out for this Court's guidance. This Court is urged to grant Certiorari to lend that guidance.

CONCLUSION

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the Circuit Court affirming Petitioner's conviction and reversing the sentence.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 10th day of April, 1995.

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APPENDIX

Opinion Below

United States vs. Koon and Powell, 34 F.3d 1416 (9th Cir. 1994)
filed August 4, 1994 . . . . . **Appendix 1.**

Amended Order Denying Rehearing and Dissents from Denial of Rehearing *En Banc*

United States vs. Koon and Powell, [NP]
filed January 12, 1995 . . . . . Appendix 2.

Amended Order Denying Rehearing and Dissents from Denial of Rehearing *En Banc*

United States vs. Koon and Powell, 45 F.3d 1303 (9th Cir.)
filed February 2, 1995 . . . . . Appendix 3.

APPENDIX 1

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. STACEY C. KOON, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50561 93-50608 D.C. No. CR-92-00686-JGD-1
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. LAURENCE M. POWELL, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50562 93-50609 D.C. No. CR-92-00686-JGD-2 OPINION

Appeals from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
May 2, 1994—Pasadena, California

Filed August 19, 1994

Before: James R. Browning and Betty B. Fletcher, Circuit Judges, and James M. Fitzgerald,* District Judge.

*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

Opinion by Judge Fletcher

SUMMARY

Criminal Law and Procedure/Sentencing/ Individual Rights

The court of appeals affirmed in part a district court judgment of conviction and sentence, vacated the judgment in part, and remanded for resentencing. The court held that the district court erred in departing downwardly on police officers sentences for deprivation of rights under color of state law, where the departures were based on the officers' susceptibility to prison abuse, administrative proceedings to which the officers would be subjected, the absence of a need to protect the public from future wrongdoing, and the unfairness of successive state and federal prosecutions for the same conduct.

After Rodney King's vehicle was observed speeding, Los Angeles Police Department (LAPD) units, including one manned by appellant Laurence Powell, pursued the vehicle. King pulled his car over, and officers ordered him and other occupants of the vehicle to get out of the vehicle and lie on the ground. King got out of the car, but did not lie down. Appellant LAPD Sergeant Stacey Koon arrived and took command. Officer Ted Briseno arrived soon after.

King eventually got down on his hands and knees, but did not get into the requested position. Officers attempted to place him in the position, but King became combative. Koon fired taser darts into King. Events occurring next were captured on a videotape (the Holliday videotape) which shows that King got to his feet in an attempt to escape. Powell and another officer began to strike King with their batons. King fell to the ground and attempted to rise. Briseno put his hand on Powell's baton. When King attempted to get up, Powell again

struck him with his baton. Powell struck King repeatedly; one or more of his baton blows fractured King's leg. Powell struck King in the chest or abdomen, and then King rolled onto his stomach. Officers stepped back for about ten seconds and Powell began to reach for his handcuffs. Briseno used his foot to stomp King in the upper back or neck. Powell began to strike King again with a baton. King was handcuffed and taken to the hospital.

Koon, Powell, Briseno and another officer, Timothy Wind, were tried in state court on charges of assault with a deadly weapon and excessive use of force by a police officer. Briseno testified that excessive force was used but that he had tried to prevent its use. The other three officers' defense was that the force used during the arrest of King was justified and not excessive. The officers were acquitted on all charges except for one count against Powell on which the jury hung.

A federal grand jury indicted the four officers. Powell, Wind and Briseno were charged with, among other things, willfully depriving King of his constitutional rights in violation of 18 U.S.C. § 242. Koon was charged with willfully permitting the other officers to unlawfully strike King and willfully failing to prevent the assault of King by officers in his presence. A videotape recording of Briseno's testimony in the state court proceedings (the Briseno videotape) was played as part of the government's rebuttal case. Briseno testified that Powell's first blow hit King in the face, and that the officers continued to strike King with the baton when he was neither aggressive nor combative. At the state trial, Briseno had been cross-examined by all three of his codefendants, as well as the prosecutor. During its rebuttal closing argument, the prosecution made remarks regarding the "horror and outrage" evoked from "Paris to Tokyo" by the Holliday video.

Briseno and Wind were acquitted. Powell and Koon were found guilty of violating § 242. At sentencing, the district court declined to impose a four-level upward adjustment for

serious bodily injury, because it found that King's serious injuries were sustained at a time when the officers were using lawful force. The court departed downward five levels for victim misconduct. The court also departed downward three levels based on a combination of three factors: 1) the "additional punishment" Koon and Powell would receive on account of their unusual susceptibility to prison abuse and the administrative LAPD proceedings to which they would be subjected; 2) the extreme absence of a need to protect the public from future wrongdoing; and, 3) the unfairness of successive state and federal prosecutions for the same conduct.

Koon and Powell appealed their convictions, contending that admission of the videotape of Briseno's state court testimony was erroneous. They also contended that the introduction of Briseno's state trial testimony violated their Fifth Amendment rights because Briseno was exposed to compelled statements that they made to the LAPD Internal Affairs Division prior to testifying. They further contended that the district court erred in refusing to grant them a hearing on their claim of double jeopardy. Koon and Powell also contended that the prosecutor's statements during its rebuttal closing argument were improper and prejudicial. Additionally, Koon contended that the instructions relating to deprivation of rights in his case were erroneous. The government appealed Koon and Powell's sentences.

[1] Koon and Powell had a full and fair opportunity to cross-examine Briseno in the state trial. The absence of certain enhancements to the Holliday videotape at the state trial did not amount to a lack of opportunity to cross-examine. [2] In addition, there was no suggestion that Koon and Powell's motive for cross-examining Briseno changed from the first to the second trial. [3] No error was committed in the admission of the Briseno videotape.

[4] The prosecution meets its Fifth Amendment burden of proving that compelled testimony is not used against a defen-

dant when it produces a legitimate, wholly independent source for all matters as to which the witness will testify. [5] The district court held a hearing and concluded that Briseno's testimony was not tainted by the exposure to the compelled statements. Such a factual finding was not clearly erroneous; [6] the record reflected a legitimate independent source of information with respect to each matter as to which Briseno testified.

[7] There was no evidence that the federal prosecution was a "sham" or "cover" for the state prosecution. Thus, the district court did not abuse its discretion in denying Koon and Powell's motions for an evidentiary hearing on their double jeopardy claim.

[8] Although the prosecution's remarks regarding the "horror and outrage" evoked by the Holliday video went beyond the bounds of appropriate advocacy and were improper, [9] the government's behavior did not constitute plain error. [10] The misconduct by the prosecution was partially invited, isolated, and of limited severity. [11] The jury's ability to weigh the evidence impartially was not materially affected by the improper remarks.

[12] Koon argued that the district court erred by drawing the definitions of both unlawful force and custody from the context of Fourth Amendment law, when the indictment charged him with depriving King of Fourteenth Amendment rights. [13] The district court, however, stated the law correctly. [14] Even in the context of an alleged deprivation of Fourteenth Amendment rights, it was altogether proper for the district court to use a Fourth Amendment excessive force benchmark when describing the harm an officer was obligated to protect a custodial suspect from suffering at the hands of other police officers. [15] There was no error in the jury instructions.

[16] Personal and professional consequences that stem from a criminal conviction are not appropriate grounds for

departing, nor are they appropriately considered as part of a larger complex of factors. They are not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes. [17] The district court's reliance on the "additional punishment" flowing from Koon and Powell's criminal conviction, therefore, was impermissible. [18] In addition, Koon and Powell's vulnerability to prison abuse rested solely on their status as police officers and on the public outrage that their crime engendered. [19] A departure based on an individual's occupation or notoriety would be inconsistent with the structure and policies of the Sentencing Guidelines.

[20] That Koon and Powell are neither dangerous nor likely to commit crimes in the future was not an appropriate basis for a departure in this case. The Sentencing Commission already took this factor into account when it drafted the Guidelines. [21] The Commission expressed disapproval of sentencing courts' departing below the range for the relevant category that already reflects the lowest risk.

[22] Reliance on the "spectre of unfairness" of dual prosecutions to support a departure was improper because it spoke neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern. [23] Thus, consideration of any of the factors identified by the district court to support the three-level departure, separately or collectively, was inconsistent with the structure and policies of the Guidelines.

[24] The district court's downward departure for victim misconduct was also not justified. The court adopted an approach toward official misconduct which was antithetical to the approach embodied in the applicable Guideline.

COUNSEL

Joel Levine, Encino, California; William J. Kopeny, Santa Ana, California, for the defendants-appellants-cross-appellees.

Steven D. Clymer, Assistant United States Attorney, Los Angeles, California; Irv Gornstein, Civil Rights Division, United States Department of Justice, Washington, D.C., for the plaintiff-appellee-cross-appellant.

OPINION

FLETCHER, Circuit Judge:

Stacey Koon and Laurence Powell ("appellants") appeal their jury convictions for deprivation of rights under color of state law in violation of 18 U.S.C. § 242. The United States appeals Koon's and Powell's sentences under the Sentencing Guidelines. We affirm the convictions but remand for resentencing.

BACKGROUND

The arrest of Rodney King occurred in the early morning of March 3, 1991 in Los Angeles. After drinking malt liquor with two friends, King left a suburb of Los Angeles and began driving. At this time he was intoxicated. Officers Melanie Singer and Tim Singer, both California Highway Patrol ("CHP") officers, observed King's vehicle speeding on the 210 Freeway. The officers began to pursue the vehicle and called on the radio for help. Several Los Angeles Police Department ("LAPD") units joined in the pursuit. Among these units was one manned by Powell and his trainee, codefendant Timothy Wind. The pursuit ended when King pulled his car over at an entrance to the Hansom Dam Recreation Area on Osborne St.

The officers ordered King and the other occupants of the vehicle to get out of the vehicle and assume a felony prone position (*i.e.* King was ordered to lie on his stomach with his arms behind his back, legs spread, heels turned toward the ground, and head turned away from the officers). King got out of the car but did not lie down. At this time Sergeant Koon arrived and took command. Police officers Ted Briseno and Roland Solano arrived soon after. The officers again ordered King to lie in a felony prone position.

King eventually got down on his hands and knees, but did not get into the felony prone position. Officers Powell, Wind, Briseno, and Solano attempted to place him in that position using a "team takedown" or "swarm." King became combative and the officers retreated. Koon then fired taser darts into King.

The events that occurred next were captured on videotape by George Holliday (the "Holliday videotape"). This videotape was the focus of much of the testimony at trial and is described in detail in the district court's sentencing opinion. *See United States v. Koon*, 833 F. Supp. 769, 774-80 (C.D. Cal. 1993). The following description of the events tracks the relevant time frames on the Holliday videotape.

As the videotape begins, it shows that King got to his feet in an attempt to escape. Powell and Wind began to strike King with their batons. At trial it was disputed whether Powell's first blow hit King in the head. The district court concluded that Powell struck King's head accidentally. *Id.* at 777. King fell to the ground and attempted to rise. At 18 seconds, Briseno put his hand on Powell's baton, which Powell had raised as he stood above King.

From 18 to 30 seconds, King attempted to get up, and was struck with batons by Powell and Wind. From the 35th second to the 51st second, Powell struck King repeatedly. At approximately 43 seconds, one or more of Powell's baton blows frac-

tured King's right leg. At 55 seconds, Powell struck King on the chest or upper abdomen. After this blow, King rolled onto his stomach and lay prone. At this point the officers suspended the use of force and stepped back for about ten seconds. Powell began to reach for his handcuffs. The district court found this movement to be evidence that Powell perceived King no longer to be a threat. *Id.*

At 1:05, Briseno moved forward and used his left foot to stomp King in the upper back or neck. King's body writhed in response. At 1:07 on the videotape, Powell and Wind began to strike King again with their batons. At approximately 1:29, King put his hands behind his neck and subsequently was handcuffed.

After King was handcuffed, Powell radioed for an ambulance. Powell sent two messages over the Mobile Digital Terminal to other officers that said "ooops" and "I havent [sic] beaten anyone this bad in a long time." Koon sent a message to the police station that said "U[nit] just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time."

King was taken to Pacifica Hospital, where he was treated for a fractured right leg, multiple facial fractures, and multiple bruises and contusions. At the hospital, Powell learned that King worked at Dodger stadium, and said to him, "We played a little ball tonight, didn't we Rodney?" King said, "I don't know." Powell said, "You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs." King responded, "Yeah I guess so." Powell said, "Yes, we played a little ball and you lost and we won."

Koon, Powell, Wind, and Briseno were tried in state court in Simi Valley, California on charges of assault with a deadly weapon and excessive use of force by a police officer. At the trial, Koon, Wind, and Powell's defense was that the force used during the arrest of King was justified and was not

excessive. In contrast, Briseno testified that excessive force was used but that he had tried to prevent its use. The four officers were acquitted on all charges except for one count against Powell on which the jury hung.

On August 4, 1992, a federal grand jury indicted the four officers. Count 1 of the federal indictment charged Powell, Wind and Briseno with willfully depriving King of his constitutional rights in violation of 18 U.S.C. § 242 and with aiding and abetting each other in violation of 18 U.S.C. § 2. Count 2 charged Koon with willfully permitting the other officers to unlawfully strike King and willfully failing to prevent the assault of King by officers in his presence, in violation of 18 U.S.C. § 242.

The case was tried to a jury commencing February 25, 1993. The jury verdicts were handed down on April 17, 1993. Officers Briseno and Wind were acquitted; Officer Powell and Sergeant Koon were found guilty of violating § 242. Koon and Powell were sentenced on August 4, 1993 to thirty months imprisonment and two years of supervised release. *See Koon*, 833 F. Supp. at 792. Appellants timely appealed their convictions and the government timely appealed the sentences. We have jurisdiction.

DISCUSSION

A. *Admission of Briseno's State Trial Testimony*

Before trial, the government moved to admit a videotape recording of codefendant Briseno's testimony in the state court proceeding. The videotape, which was ultimately played as part of the government's rebuttal case, was the subject of many motions in the district court, and continues to be the subject of various claims on appeal.

Briseno's testimony was highly damaging to Koon and Powell. He testified, among other things, (1) that Powell's

first blow hit King in the face — which was inconsistent with Powell's position at trial; (2) that Powell delivered a second series of much more forceful blows to King "from the shoulder up"; (3) that Briseno couldn't see or understand what justified the other officers' behavior; (4) that Briseno grabbed Powell's baton and told him to "get the hell off" King; (5) that Briseno yelled to Koon "what the fuck [is] going on out here," but Koon did not respond; (6) that the officers continued to strike King with the baton when he was neither aggressive nor combative; and (7) that Briseno went to the police station after the incident intending to report the use of force.

At the state trial, Briseno was cross-examined by all three of his codefendants as well as the prosecutor, who spent part of his time trying to establish Briseno's own culpability. On both direct and cross-examination, Briseno stated repeatedly that he thought the other officers had acted wrongly. These statements of opinion were redacted from the videotape played at the federal trial.

On appeal, Koon and Powell contend that admission of the videotape violated their Confrontation Clause rights. They also argue that the videotape should not have been admitted as rebuttal evidence, and that it contained improper lay opinion evidence.

1. *Confrontation Clause Challenge*

"The Confrontation Clause promotes accuracy in the criminal process by ensuring that the trier of fact has a satisfactory basis for evaluating the truth of out-of-court statements." *Barker v. Morris*, 761 F.2d 1396, 1399 (9th Cir. 1985) (citations omitted). When a hearsay declarant is unavailable to testify at trial, his out-of-court statements may be admitted without violating the Confrontation Clause so long as those statements bear sufficient indicia of reliability. *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987). "[N]o independent inquiry into reliability is required" under the Confronta-

tion Clause, however, when the out-of-court statements "fall within a firmly rooted hearsay exception." *Id.* at 183. Since Rule 804(b)(1) is a firmly rooted exception to the hearsay rule, *Mattox v. United States*, 156 U.S. 237 (1895) (discussing history of the exception); *United States v. Kelly*, 892 F.2d 255, 262 (3d Cir. 1989) (collecting authorities), *cert. denied*, 497 U.S. 1006 (1990), our analysis focuses on whether the district court erred under Rule 804(b)(1) in admitting Briseno's former testimony.[1]

Under Rule 804(b)(1), testimony from another proceeding is not excluded by the hearsay rule if the declarant is unavailable,[2] and if "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Appellants argue that the Briseno videotape should not have been admitted because at the state trial they lacked sufficient opportunity to cross-examine Briseno. Appellants point out that in the state proceeding they did not have the benefit of various enhancements to the Holliday videotape which were available at the federal trial.[3]

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[1]The parties debate whether, given this collapse of the constitutional analysis into the Rule 804(b)(1) analysis, the abuse of discretion standard which governs admission of Rule 804(b)(1) evidence should apply, *see United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984), or whether the court should review de novo those Rule 804(b)(1) cases in which a constitutional claim is raised. We need not decide the issue, however, because we conclude that appellants cannot prevail under either standard. *See United States v. Payne*, 944 F.2d 1458, 1468 n.9 (9th Cir. 1991).

[2]Appellants do not dispute that Briseno, who chose not to testify in the federal trial, was "unavailable."

[3]Three enhancements were used at the federal trial: (1) the "filtered audiotape," which filtered out helicopter noise and purportedly made audible certain commands by Koon as well as the sounds of a taser being activated just before King went down (prepared by the defense); and (2) the "zoom videotape," which blew up the frames showing Powell's first blow

[1] We reject appellants' argument. Appellants had a full and fair opportunity to cross-examine Briseno in the state trial. Indeed, they do not argue that the state court in any way interfered with their ability to carry out an effective cross-examination. They instead claim that the absence of the enhancements to the videotape at the state trial amounts to a lack of opportunity. We disagree. The failure of a defendant to discover potentially useful evidence at the time of the former proceeding does not constitute a lack of opportunity to cross-examine. *See Thomas v. Cardwell*, 626 F.2d 1375, 1386 n.34 (9th Cir. 1980), *cert. denied*, 449 U.S. 1089 (1981). In *Thomas*, the prosecution introduced, at defendant's second trial, the testimony of a witness from defendant's first trial who had become unavailable. *Id.* at 1384. By the time of the second trial, the defendant claimed to have discovered evidence that this witness was schizophrenic. *Id.* at 1386 n.34. The *Thomas* court rejected the argument that the purported discovery of new evidence established defendant's lack of opportunity to cross-examine the witness at the first trial. After noting that there was no suggestion that the defendant's failure to discover the information was the prosecution's fault, the court explained that

> often information will surface after a trial which, if known to a defense attorney, would have made the cross-examination of a witness more thorough or even more advantageous to the defendant. Nevertheless, that lack of information does not make the

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to King (prepared by the defense); and (3) the "registered videotape," which stabilized the video image (prepared by the government).

In the district court, in addition to arguing that the lack of these enhancements hampered their ability to cross-examine Briseno during the state proceeding, appellants argued that their motive for cross-examination was different in the state than in the federal trial because in the federal trial the prosecution was required to show a higher level of intent.

Appellants have not pursued this latter argument on appeal.

> opportunity for cross-examination ineffective even though the cross-examination itself is less than optimal for the defendant.

Id.

Much the same applies here. Appellants did not lack the opportunity to cross-examine Briseno; they lacked only some of the tools which were later developed by the government or by appellants themselves, and which appellants argue would have allowed them to cross-examine Briseno to better effect. Appellants' failure to take full advantage of their opportunity to cross-examine in the first trial — by developing those tools earlier — cannot alter the fact that they *had* that opportunity. *See United States v. McClellan*, 868 F.2d 210, 215 (7th Cir. 1989) ("the emphasis in [the Rule 804(b)(1)] inquiry is upon the motive underlying the cross-examination rather than the actual exchange that took place"); *United States v. Salim*, 855 F.2d 944, 953-54 (2d Cir. 1988) (under Rule 804(b)(1), defendant is entitled to " 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' ") (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam)) (emphasis in original).[4]

In addition to a full opportunity, Rule 804(b)(1) requires that appellants' motive in carrying out their state trial cross-examination of Briseno was similar to the motive they would have had in the later proceeding. We conclude easily that it

[4]Appellants argue that the newly discovered information in *Thomas* pertained only to the credibility of the witness, whereas the newly developed enhancements here pertain to the crime itself. Appellants do not explain why this distinction matters, however, and nothing in *Thomas* reveals its significance either. At the state trial, appellants had the opportunity to cross-examine Briseno concerning both extrinsic facts about the charged crime, and circumstances in his own situation which might lessen his credibility. It is that opportunity, rather than the scope or efficacy of its employment, which is important under Rule 804(b)(1).

was. The operative facts and legal issues in the state and federal trials were substantially similar, *see United States v. Salerno*, 112 S. Ct. 2503, 2509 (1992) (Blackmun, J. concurring) (" 'similar motive' does not mean 'identical motive' "), and appellants do not challenge the district court's finding to this effect. Appellants thus had every reason to develop Briseno's testimony in the state trial with an eye to undermining his credibility and casting into doubt his statements about their behavior. *See United States v. Poland*, 659 F.2d 884, 895-96 (9th Cir. 1981) (holding that defendant's motive for cross-examination at suppression hearing was similar under Rule 804(b)(1) to his motive for cross-examination at trial).

Appellants maintain that their position is supported by *People of the Territory of Guam v. Hayes*, 1993 WL 469357 (D. Guam 1993), in which a three-judge panel held that the trial court erred in admitting former testimony because the defendant had not had the same *motive* to cross-examine the witness about certain facts in the first trial as he had in the second trial. However, the *Hayes* court made clear that this difference in motive occurred because "different issues arose at the second trial which [defendant] could not possibly have anticipated at the first trial." *Id.* at *2.[6]

[2] Here, by contrast, there is no suggestion that either the factual nature of the case against appellants or appellants' motive for cross-examining Briseno changed at all from the first to the second trial. All that changed was the technology that appellants might have used to enhance the Holliday vid-

[6]The victim in *Hayes*, "K.," testified at defendant's first trial, but then moved from Guam and was unavailable at the second trial. K's testimony from the first trial was introduced at the second trial. The prosecution also called as a witness Mrs. Muna, who testified about statements made by K. which were *not* disclosed at the first trial. The appellate court concluded that defendant's motive to cross-examine K. was different at the first than at the second trial, because at the first trial defendant did not have "the additional motivation . . . of proving that K. didn't make the statements attributed to her by Mrs. Muna." *Id.* at *2.

eotape as a basis for questions in the cross-examination. Because this change constitutes a deficiency in neither the opportunity to cross-examine nor the motive for doing so, appellants' argument under Rule 804(b)(1) must fail.

2. *Use of Videotape as Rebuttal Evidence*

Appellants next contend that even if there was no Confrontation Clause violation, the district court erred in admitting the Briseno videotape as rebuttal evidence. As district courts have wide latitude in deciding what constitutes proper rebuttal evidence, *Geders v. United States*, 425 U.S. 80, 86 (1976), we review such determinations for an abuse of discretion. *Rent-A-Center v. Canyon Television & Appliance*, 944 F.2d 597, 601 (9th Cir. 1991).

Appellants first argue that Briseno's testimony did not rebut anything presented in their defenses. We disagree. Briseno's testimony rebutted Koon's statement that Powell's first blow struck King on the shoulder area rather than on the head, Koon's expert's testimony that the officers' use of force was justified because King continued to be combative and aggressive, and Powell's former police instructor's testimony that Powell had done nothing he had not been trained to do.

Appellants next argue that even if some portions of the videotape properly rebutted elements of their cases, the district court nonetheless erred in permitting the government to introduce as rebuttal *both* those parts of the videotape which in fact rebutted their evidence, *and* those parts which were offered solely against Briseno.[8] No one suggests that appel-

[8]Briseno neither testified nor presented any evidence on his behalf, save for introducing a single boot, one he had worn the night of the incident. At trial, he argued that his Fifth Amendment rights would be violated if his former testimony was admitted against him on rebuttal despite the fact that he had put on no evidence of his own. He was concerned primarily with those portions of the videotape in which he testified that he went to the police station to file a report on the use of force. The government's position was that Briseno never went to the police station, and that his false exculpatory statement was proof of his consciousness of guilt.

factors into account, and required the government to make the difficult showing that appellants *willfully* came down on the wrong side of the *Graham* standard. Thus the feature which the district court found unusual, and exculpatory, is built into the most fundamental structure of excessive force jurisprudence, and in criminal cases is built in twice.

The district court was troubled by the fact that U.S.S.G. § 2H1.4 applies both to excessive force cases of the *Graham* variety and to cases in which a law enforcement or corrections officer applies force which is unlawful from the beginning. The district court saw the appellants' lawful authority to use or allow the use of *some* force, and what it perceived as the slenderness of the line between legitimate and illegitimate force, as factors partially exculpating appellants. Section 2H1.4, however, adopts exactly the opposite approach. The guideline punishes those vested with governmental authority *more* severely than private actors who are guilty of comparable conduct: this is the reason the guideline starts with the "underlying" offense and then increases the offense level by 6. *See* U.S.S.G. § 2H1.4, comment. (backg'd); *see also* U.S.S.G. § 3B1.3, comment. (backg'd). The fact that appellants were authorized to use *some* force in this case does not mitigate the fact that they used too much. Under the structure and policies of the Guidelines, it makes it worse.

In a great many § 242 cases, the defendant has authority to use appropriate force. The district court's rationale for departure in this case was that here, due to the victim's misconduct, the officers were legitimately called upon to use force *in this particular incident*, and that the incident itself was so volatile that legal force quickly became illegal. But the policy behind the punitive structure of § 2H1.4 does not apply any less to an officer who crosses the line into illegality *after* he begins to apply force to a victim than it does to the officer who crosses that line *as soon as* he begins to hurt the victim. The policy behind the guideline applies with equal or greater force in the former case: the victim who is a wrongdoer is especially vul-

nerable to abuses by officials, because the legitimate sway of authority over him is greater to begin with. The structure of § 2H1.4 suggests that the slenderness of the line separating legal from illegal uses of state power is a reason for victims, and for society, to be especially concerned. It cannot at the same time be a reason to partially excuse those who transgress.[37]

As justification for the five-level departure, the district court relied not only on the conclusion that appellants' offense conduct fell outside the heartland of § 2H1.4 cases, but also on the conclusion that it fell outside the heartland of *aggravated assault* cases (i.e., § 2A2.2). "The stringent aggravated assault Guideline . . . contemplates a range of offenses involving deliberate and unprovoked assaultive conduct. The Guidelines do not adequately account for differences between such 'heartland' offenses and the case at hand." *Koon*, 833 F. Supp. at 787. The district court thus drew an implicit contrast between appellants and *civilian* offenders, noting that "Koon and Powell did not seek out a victim; rather, their very

[37]The fact that § 2H1.4, like § 242, encompasses different kinds and degrees of misconduct is in itself insufficient to justify a downward departure. *See United States v. LeBlanc*, 24 F.3d 340, 347 (1st Cir. 1994) (although money laundering offenses which stem from prior unlawful activity of running an illegal gambling business differ from the "classic" offense of laundering drug money, downward departure is impermissible because the offense at issue falls within the plain language of the statute and clearly was intended to be reached by Congress). Appellants' conduct fell squarely within § 242: the statute criminalizes the deprivation of *all* Constitutional rights. *United States v. Price*, 383 U.S. 787, 803 (1966) (discussing legislative history). Hence "once a due process right has been made specific by court decisions, that right is encompassed by § 242." *United States v. Langer*, 958 F.2d 522, 524 (2d Cir. 1992) (internal quotation marks and citations omitted). The rights King was deprived of have been clearly established for decades, and willful conduct which deprived him of those rights falls within the heartland of both the statute and the Guidelines. The fact that willful violators of the rights at issue in this case may not be prosecuted as often as other violators of § 242 does not alter the analysis. In itself it says nothing about individual culpability, although it may say something about evidentiary difficulties and about the litigation strategies of the federal government.

presence at the scene was a consequence of Mr. King's wrongful conduct." *Id.* Similarly, the court noted that "[p]olice officers are always armed with 'dangerous weapons' " — thereby suggesting that application of the weapons enhancement may be unfair in a case where the defendant is a police officer rather than a civilian. *Id.*

But to depart because of a perception that this case falls outside the heartland of aggravated assault cases again subverts the structure of § 2H1.4. That guideline explicitly enhances sentences for official misconduct *beyond* those for civilian misconduct. The Sentencing Commission cannot have been blind to the fact that the circumstances out of which official misconduct arises are different from the circumstances which give rise to civilian misconduct. The Commission, in fact, recognized those differences and used them as the basis for harsher rather than more lenient punishment.

[24] We conclude that the district court's rationale for departing downward is flawed. The court isolated as unusual a factor which is at the very heart of excessive force jurisprudence. The court also adopted an approach toward official misconduct which is antithetical to the approach embodied in the applicable guideline. The five-level downward departure was not justified.[38]

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[38]We do not conclude that a departure for victim misconduct would *never* be permissible in a police case. Such a departure might be appropriate, where, for example, the victim kills or wounds an officer's partner in his presence. In such a case, victim misconduct plays a role similar to that played by provocation in the more usual crimes of passion: the defendant is to a certain extent excused because he was seized by passion, and acted in the heat of the moment. This appears to have been the rationale in those cases where departures under § 5K2.10 were affirmed. *See United States v. Tsosie*, 14 F.3d 1438 (10th Cir. 1994); *United States v. Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989) (assaults triggered by sexual jealousy or humiliation). This is distinguishable from the district court's rationale, which relies on the vicissitudes of police work, and the difficulty in drawing the line between proper and improper uses of force.

3. *Failure to Adjust Upward Four Points for Serious Bodily Injury*

The district court imposed a two-level upward adjustment for bodily injury under U.S.S.G. § 2A2.2(b)(3)(A), rather than a four-level adjustment for serious bodily injury under U.S.S.G. § 2A2.2(b)(3)(B). The government argues that the latter adjustment is warranted by the blow, administered by Powell 43 seconds into the videotape, which fractured King's leg. The district court acknowledged that this blow caused serious bodily injury, but found that Powell was not acting criminally when he delivered it.

As the government points out, the district court left it unclear whether or not the blow in question constituted excessive force: the court found that the blow "may have been tortious," 833 F. Supp. at 778, but concluded that Powell was not *criminally* liable for the blow, because the court was unable to find that he had intended at that time to use excessive force.[39] *Id.* It is the latter conclusion which the government attacks on appeal.

The district court supported its findings with the following observations: (1) blows to the leg joints are within LAPD policy, if necessary to avert a threat; (2) preceding the blow, the situation had evolved rapidly, and (3) King had tried to rise; (4) even as Powell delivered blows around the time of second 43, King continued to move, and to resist attempts to place him into the felony-prone position. *Id.*

The government contends that these reasons cannot be sustained, and musters countervailing evidence of its own: (1) there is a presumption that people who use unreasonable force

[39]The district court made the same finding with respect to Koon's criminal liability for the leg injury, and for the same reasons. *Koon*, 833 F. Supp. at 779-80. In the remainder of this discussion, references to Powell's liability refer to Koon's as well.

know that it is unreasonable; (2) both Koon and Powell showed an awareness of wrongdoing after the event (by lying and by bragging); (3) Koon and Powell had been taught not to use a baton on a suspect, unless the suspect is combative or aggressive; and (4) there is no reason to distinguish the leg-breaking blow from the later blows which the court found *were* criminal.

None of these arguments establishes that the district court committed clear error.

First, the district court was not bound to embrace the presumption which the government contends should apply. The court's specific findings of fact override general presumptions.

Second, the fact that Koon and Powell may have been conscious of guilt does not show *when* their criminal wrongdoing occurred. Their lies and boasts may have been directed to the later conduct which the district court found was criminal, and not to the earlier conduct. The later blows caused only soft tissue bruising.

Even if Powell's most damaging blow was not authorized by LAPD policy, this does not mean that Powell necessarily intended to use unreasonable force. Police department policy permitted blows to forestall aggressive or combative behavior, and the district court found that King was continuing to move at the time. While such movement may not in fact have been aggressive, it may have appeared so. Powell's reaction could reasonably be found to be an error of judgment rather than an intentional use of excessive force.

Finally, the district court provided a reason to distinguish between the officers' intent at the time of the leg-breaking blow and their intent during the 19 seconds of the videotape in which the court concluded that criminal activity occurred. Those latter 19 seconds were preceded by a period in which

King lay on his stomach, and posed no threat. *Koon*, 833 F. Supp. at 777. The court found no comparable period of compliance preceding the leg-breaking blow.

The government quarrels with the evidentiary basis for this latter finding, and contends that both the Holliday videotape and the testimony of government witnesses establish that King ceased to pose a threat, at the very latest, 30 seconds into the tape. But the defense witnesses testified that King continued to pose a threat at that time. The district court concluded that the videotape was "sometimes an ambiguous record of the crucial events," *id.* at 776, and the conflicting testimony at trial bore this out. Although we may not agree, the district court resolved those ambiguities in favor of the defense. Its resolution was not inconsistent with the verdicts, and the government has not established clear error.

CONCLUSION

We affirm appellants' convictions. After a careful review of the record and the relevant authorities, we are convinced that the district judge correctly resolved each of the legal issues raised by appellants as to the guilt phase of the proceedings. He conducted the trial with impeccable fairness and careful and thoughtful attention to its every aspect. We appreciate the magnitude of the task, given the unusual number and complexity of the issues involved, and the difficult circumstances caused by the extraordinary publicity surrounding every phase of the proceedings. However, we are also convinced that the sentences imposed by the district court are inconsistent with the structure and policies of the Sentencing Guidelines and the federal sentencing statutes, and we therefore vacate the sentences and remand for resentencing consistent with this opinion.

AFFIRMED IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING.

APPENDIX 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. STACEY C. KOON, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50561 93-50608 D.C. No. CR-92-00686-JGD-1
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. LAURENCE M. POWELL, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50562 93-50609 D.C. No. CR-92-00686-JGD-2 ORDER, DISSENT, AND CONCURRENCE

Filed January 12, 1995

Before: James R. Browning and Betty B. Fletcher, Circuit Judges, and James M. Fitzgerald,* District Judge.

ORDER

All of the panel members have voted to deny the petitions for rehearing of both defendants.

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*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

Judge Browning and Judge Fletcher have voted to reject the suggestions for rehearing en banc of both defendants and Judge Fitzgerald has so recommended.

The full court was advised of the suggestion for rehearing en banc. A judge of the court requested a vote as to whether to take the case en banc. A vote was taken. The request failed to secure the affirmative vote of a majority of the active non-recused members of the court. Judge Trott was recused.

The petitions for rehearing of both defendants are denied and the suggestions for rehearing en banc of both defendants are rejected.

REINHARDT, Circuit Judge, dissenting, with whom PREGERSON, WIGGINS, KOZINSKI, NOONAN, and HAWKINS, Circuit Judges, join, and with whom O'SCANNLAIN, T.G. NELSON, and KLEINFELD, Circuit Judges, join, except as to Part IV:

I dissent from the refusal to rehear this case en banc. While I agree that there is no prejudicial error that requires reversal of the convictions, I believe that the panel seriously erred in vacating the downward departures ordered by Judge Davies. In my opinion, the district court acted well within its discretion in sentencing the defendants to prison terms below the Guidelines range. Sergeant Koon and Officer Powell were first-time offenders. The sentences ordered by Judge Davies were severe indeed. Neither law nor justice requires that they be set aside or that any longer prison terms be imposed.

In stretching to reach its result, the panel casts aside the basic principles that should underlie judicial sentencing, even in the age of the Guidelines. It is only by exhalting the rigid calculations of charts and tables over the judgment of human beings that the panel reaches its conclusion that Judge Davies

was too lenient. The panel's encroachment on district court discretion epitomizes the mechanical and inflexible approach to sentencing that so many critics contend the Guidelines themselves represent.[1] Indeed, under the panel's view of the district judge's role in sentencing, district courts would be divested of much of the limited discretion they retain under the Guidelines. As a result, the panel's opinion would make far worse an already unfair and unjust sentencing scheme. It is difficult to believe that the panel truly wishes such an approach to apply to defendants generally.

The panel's unduly restrictive approach to Guidelines sentencing is not the sole vice in its opinion. The opinion is both internally inconsistent and in direct conflict with our prior holdings. As a result, it does not even have the virtue of clarifying our departure jurisprudence. By refusing to use the en banc process, we miss an important opportunity to provide district judges, including Judge Davies on remand, with clear guidance in the area of downward departures and leave them with little choice but to pick and choose among our various irreconcilable statements.

I.

The district judge sentenced Koon and Powell to 30-month prison terms. He determined the sentences to be appropriate after departing downward from the Guidelines range by a total of eight points. First, he concluded that a three-point departure was in order because of the presence of an unusual combination of factors. Second, he concluded that a five-point departure was justified as a result of victim misconduct. The sentence was entirely consistent with the Guidelines.

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[1] *See e.g.* Hon. Jose A. Cabranes, *Sentencing Guidelines: A Failed Utopian Experiment*, **Nat'l L. J.**, July 27, 1992 at 2 (Circuit Judge, United States Court of Appeals for the 2d Circuit); Hon. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 **S. Cal. L. Rev.** 357 (1992) (U.S. District Judge, Eastern District of New York).

The Guidelines are clear that a sentencing judge may depart downward from the Guidelines in "atypical" or "unusual" cases. U.S.S.G. Ch.1, Pt.A, § 4(b) and § 5K2.0. Moreover, we have noted that, except for a small set of *prohibited* factors, " 'the Commission does not intend to limit the kinds of factors, whether or not mentioned elsewhere in the guidelines, that could constitute grounds for departure in an unusual case.' " *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991) (quoting U.S.S.G. Ch.1, Pt. A, § 4(b)). This approach affords the district court a certain degree of flexibility and permits it to act in a more humane and reasonable manner than the Guidelines would otherwise allow.

In its consideration of the three-point combination departure, the panel rejects the relatively enlightened view of departures expressed in both the Guidelines and our prior cases. Judge Davies' based his three-point departure on a combination of three non-prohibited factors. He considered the fact that the officers would be subject to additional punishment, both professionally and in prison. *Koon*, 833 F. Supp. at 785-86. He then noted that because "neither Koon nor Powell are violent, dangerous, or likely to engage in future criminal conduct," there was an absence of any need to protect the public. *Id.* at 786. Finally, he concluded that "a specter of unfairness" marked the federal trial because it followed an earlier unsuccessful state prosecution of the officers. *Id.* at 790. Judge Davies emphasized that he did not base his departure on any one of the discrete factors individually. Instead, he departed only because of the combined presence of three circumstances which "taken together, justify a reduced sentence." *United States v. Koon*, 833 F. Supp. 769, 786.

In considering the three-point departure, the panel, despite including cursory language in its opinion acknowledging the correct rule, applies a method of review that if adopted generally would essentially eliminate departures based on a combination of factors. What the panel did was to examine each

factor individually and conclude that each was not "appropriate" to support a departure. The panel failed to make the proper inquiry: whether the factor was *prohibited* by the Guidelines. Instead, it created its own category of *inappropriate* factors, namely those which are not prohibited but which in the panel's opinion do not warrant a departure. The fallacy in the panel's approach is that if the individual factors must each be "appropriate", there would be no need to rely on a combination of factors.

The panel's methodology is at odds with our established precedent. The principle underlying our combination departure cases is rooted in the common sense maxim that the whole is greater than the sum of its parts. For that reason, in reviewing combination cases, we have considered the totality of the circumstances and the interplay between or among the various factors, not whether the individual factors in the mix could in themselves constitute a ground for departure. "[I]t will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decisions." *Cook*, 938 F.2d. at 153; *see also United States v. Fairless*, 975 F.2d 664, 669 (9th Cir. 1992); *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), *corrected*, 956 F.2d 203 (9th Cir. 1992), *and subsequently superseded*, U.S.S.G. § 5H1.12; *United States v. Takai*, 941 F.2d 738, 743 (9th Cir. 1991).

The panel at no point considered the interplay of the various factors that Judge Davies considered. Instead, it assessed each of the factors independently and concluded in each instance that it would be inconsistent with the Guidelines to depart downward on the basis of that isolated factor — notwithstanding the fact that *none* of them was a *prohibited* factor. The panel then rejected the combination of factors on the basis that each one constituted an inappropriate basis for departure. No combination departure could survive this divide and conquer method of review.

A clear example of the panel's erroneous approach is found in its discussion of the vulnerability to prison abuse issue. The

panel rejected Judge Davies' consideration of this factor on the ground that "the number of defendants who might qualify for *this departure* is virtually unlimited . . . ." Slip op. at 9431 (emphasis added). The term "this departure" is clearly incorrect. There was *no departure* based on the factor that the panel is discussing. The departure at issue was based on a combination of factors that included as only one element the potential for prison abuse. The number of persons who would be affected by the combination of factors would *not* be "virtually unlimited." To the contrary, the number would be small indeed. Thus, the panel's statement as to the number "who might qualify" is just plain wrong. It reaches its mistaken conclusion only because it violated *Cook*'s clear command and considered one factor in the combination "abstractly and alone." *Cook*, 938 F.2d at 153. Far more important, however, it is this method of analysis that permeates the panel's opinion and leads it, inevitably, to the wrong result.

The panel's discussion of the *kinds* of factors that Judge Davies considered in his three-point departure gives rise to even more serious problems. Some of our cases have held that only factors that relate to the offender's culpability or to the nature of the offense may justify departure. *See, e.g., United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990). Others have reached precisely the opposite conclusion. *See, e.g., United States v. Crippen*, 961 F.2d 882, 885 (9th Cir. 1992). The panel fails to reconcile these irreconcilable positions.

Although the panel's opinion purports to endorse the highly restrictive view set forth in *Alvarez-Cardenas*, in the end it only adds to the chaos in our case law. Following *Alvarez-Cardenas*, the opinion flatly states that "personal and professional consequences" of a conviction "are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors." Slip. op. at 9427. However, that statement, while consistent with *Alvarez-*

Cardenas, conflicts squarely with *United States v. Mondello*, 927 F.2d 1463, 1469-70 (9th Cir. 1991) (stating that the effect of imprisonment on the offender's family *is* a permissible basis for departure); *see also* § 5H1.6. Perhaps because it recognized the conflict in our cases, or perhaps because it perceived the gross unfairness of its position, the panel substantially undermines the statement by announcing that it does "not intend to imply that factors that do not speak to" the nature of an offense or culpability "are *never* relevant." Slip op. at 9427 n.3 (emphasis in original). Such conflicting pronouncements within the same opinion cannot help district judges who must administer the Guidelines and make sense of our holdings; nor should they stand as the law of this circuit.

Moreover, the panel's statements that the "personal and professional consequences" of a conviction may not be considered constitutes a square rejection of the holding we announced in *United States v. Aguilar*, 994 F.2d 609, 643-45 (9th Cir. 1993) (opinion of O'Scannlain, J.), *op. withdrawn*, 11 F.3d 124 (1993), and *op. replaced on reh'g en banc*, 21 F.3d 1475 (1994). In *Aguilar*, Judge O'Scannlain, in the part of his opinion joined by Judge Hug, explained that district courts have discretion to depart downward from the Guidelines on the basis of the "additional punishment" beyond imprisonment that a conviction may impose. *Id.* at 643.

The panel does not address *Aguilar*'s reasoning. While the panel is correct that the original panel opinion in *Aguilar* no longer represents binding precedent, it is surely wrong in concluding that the opinion therefore merits no more than a dismissive half-sentence reference to that fact. Slip op. at 9425. The en banc court reheard the case and reversed Aguilar's conviction; accordingly, it did not reach the sentencing question. As a result, the court as a whole never expressed any doubt as to the correctness of Judge O'Scannlain's extensive and perceptive discussion of downward departures. Unlike the panel here, Judge O'Scannlain saw no reason to prohibit sentencing judges from taking into account the practical effects

of sentences on the lives of affected individuals. As his opinion made clear, the Guidelines were not intended to treat human beings as impersonal objects whose fate was to be determined solely on the basis of statistical surveys.

Judge O'Scannlain's opinion in *Aguilar* was still binding at the time Judge Davies imposed the sentences on Koon and Powell. Accordingly, he acted properly in basing the sentencing decision on that holding. *Koon*, 833 F. Supp. at 789.[2] At the time of sentencing, our law was clear that "additional punishment" did constitute a proper basis for a downward departure. At a minimum, Judge Davies, as well as other district judges, are entitled to an explanation from the panel as to why we are so abruptly rejecting the *Aguilar* reasoning. So, too, are the defendants who were properly sentenced under the law as it existed at the time of sentencing only to find that on appeal a panel of our court adopted a different view that requires them to be resentenced under a harsher standard.[3] In my opinion, the panel was not justified in peremptorily dismissing a reasoned analysis that bears so directly on the issues in this case and has such drastic consequences for these and other defendants.

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[2] *Aguilar* was not taken en banc until almost a month after Judge Davies filed his opinion.

[3] The fact that Koon and Powell will now be resentenced under a stricter interpretation of the Guidelines than existed at the time of their initial sentencing may itself constitute a circumstance to be considered at resentencing. While the change in our case law may not be enough in itself to justify a downward departure, the sentencing judge may want to consider the psychological and emotional effect on the defendants of the change in our law. Both defendants were initially properly sentenced to shorter terms under a rule of law that was valid at the time. There is a certain expectancy that results from such a circumstance. Each defendant now faces a potentially harsher prison term only because the sentencing rules have been changed as the result of the government's appeal. Ironically, the panel's decision may thus have the effect of creating a new "specter of unfairness" which could be considered, consistent with the Guidelines, as one of the factors in a combination justifying departure.

II.

The panel's analysis of the five-point departure, like its analysis of the three-point departure, is premised on a highly restrictive and inflexible reading of the Guidelines and a view hostile to the district court's proper role in sentencing. Judge Davies based his five-point downward departure on his finding that there was victim misconduct. *Koon*, 833 F. Supp. at 787. The panel accepted this finding; accordingly, our analysis must start from that premise, correct or not. The Guidelines specifically provide for downward departures when victim misconduct "contribute[s] significantly to provoking the offense behavior." § 5K2.10. The panel reversed Judge Davies' departure, holding that, in the context of excessive force cases, an act provokes only if it precipitates an immediate response. Slip op. at 9437. Here, again, the panel erred.

The applicable policy statement plainly rejects the requirement of a tight nexus between the provocative behavior and the resulting unlawful conduct. The policy statement specifically instructs a district court to consider "*any other relevant conduct* by the victim that substantially contributed to the danger presented." § 5K2.10(e) (emphasis added). Moreover, it suggests that a departure may be warranted if the unlawful behavior follows an "*extended course* of provocation and harassment." *Id.* (emphasis added).

Having erroneously concluded that provocation encompasses only a very limited range of acts, the opinion surmises that in fact Judge Davies must have based the departure on the volatility of the arrest. The panel then proceeds to explain why volatility *never* constitutes a permissible ground for departure in an excessive force case — although it can point to no guideline language that would support such an absolutist view. Slip op. at 9438-39. In short, the panel's treatment of the five-point departure is dictated less by the language or spirit of the Guidelines than by hostility to Judge Davies' decision to depart.

III.

Our cases adopt two contradictory general approaches to downward departures. One approach emphasizes the importance of the district court's discretion to depart and stresses that the guidelines "were not meant to be a straightjacket for district judges." *Cook*, 938 F.2d at 152; *United States v. Garza-Juarez*, 992 F.2d 896, 911 (9th Cir. 1993). The other takes a narrow view of the sentencing judge's role and severely limits the circumstances that justify departure. *See, e.g., Alvarez-Cardenas*, 902 F.2d at 737. For reasons that still confound me, in this case the panel casts its lot with the restrictive approach.

In choosing to apply a highly limited view of judicial discretion to the case of Koon and Powell, the panel accomplishes little except to undo a perfectly proper sentence, and to treat the defendants in a harsh and unfair manner. Certainly, the panel does nothing to resolve the underlying conflict in our case law. Only an en banc panel can do that in any event. As of today, our rules remain unclear and district judges are left with little guidance. They will simply have to do their best to determine which of our cases — and which of the contradictory statements in the panel's opinion — are to be followed in particular circumstances.

As a result of our refusal to take this case en banc, all Judge Davies will know with certainty on remand is that in order to depart from the Guidelines, he must point to "a legitimate sentencing concern," slip op. at 9427 & 9434, and must consider factors that are consistent with the "structure and purposes of the Guidelines," slip op. at 9424. The conflicting definitions we have given to these virtually empty phrases will leave Judge Davies without specific guidance when he decides whether to depart downwardly once again. If after reexamining all of the facts and circumstances in this most regrettable case, he again concludes that there are factors present that warrant a downward departure from the Guide-

lines, he will only be able to do his duty as he himself sees it. I hope that this time any exercise of the discretion he is supposed to possess will be examined with greater understanding and solicitude.

IV.

As a final point, I note that once again, consistent with our longstanding policy, we refuse to disclose to the public important information regarding an official action of this court. Following an en banc vote, we only tell the public whether or not the en banc call carried. We refuse to disclose whether a decision not to go en banc was made by an equally divided court or whether only a single judge wished to reconsider the panel's decision. We also refuse to disclose how individual judges cast their ballots.[4] By these rules, we immunize our individual actions from public scrutiny. In my opinion, we are wrong to do so. The public has a right to know how all public officials, including judges, conduct the public's business.

I am aware of the arguments in favor of the rule that we have adopted. It is possible that a vote for or against en banc review will be misconstrued by the public as constituting agreement with or opposition to the merits of the opinion in question even though a judge has cast his ballot on entirely different grounds. However, the fact that a public action may

[4]Under our rules, all active judges are permitted to vote on en banc calls and a call fails unless a majority of the non-recused judges cast affirmative votes. Our rules do not permit judges who wish to record their votes to do so. Instead, judges may inform the public of their votes only through their participation in dissents from denials of suggestions for rehearing en banc. Many judges prefer not to join in published opinions expressing disagreement with procedural actions of this court, even when those actions determine the outcome of important cases. As I have noted before, our rule ensures that the public knows even less about our en banc process than it does about the Supreme Court's decisions with respect to granting certiorari. *See Harris v. Vasquez*, 949 at 1539 (explaining that Supreme Court Justices are always permitted to make public their votes on petitions for certiorari).

be misunderstood is not a reason for suppressing information. Whatever the costs of disclosure may be, I have no doubt that the costs of secrecy are greater.

I have addressed the problems of non-disclosure of en banc votes before. Previously, I noted that the public is often deprived of crucial information regarding death penalty cases. *See Brewer v. Lewis*, 997 F.2d 550 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of en banc review); *Harris v. Vasquez*, 949 F.2d 1497, 1539 (9th Cir. 1990). I have also noted that our rule of secrecy is equally indefensible in other cases that involve questions of great public interest. *See Elder v. Holloway*, 984 F.2d 991, 1000 (9th Cir. 1993) (Reinhardt, J., dissenting) (disagreeing with the rule precluding disclosure of en banc votes in the context of a civil right case).

Indeed, it is usually the most controversial cases — and the ones that are likely to have the widest impact on the public — that are the subject of the most fiercely debated en banc calls. The votes cast in them are clearly of concern to the public. The people have a right to know both how close the decision is on our en banc votes and how each judge voted on particular calls.

Information about the numerical outcome of the votes is necessary in order for the public, the legal community, and the academic world to assess the en banc process itself. For example, it would surely be of interest to those who study the courts if a series of en banc calls failed even though supported by a majority of the judges who actually voted. With such information, court observers could evaluate the soundness of our voting procedures and suggest reforms. There is another reason that readily comes to mind. There are several vacancies on this court. In fact, one seat has been vacant for well over two years. Disclosure of the numerical outcome of our en banc votes would assist the public in determining the practical impact on our operations of the president's inexplicable failure to perform his constitutional duties expeditiously and

to better assess the quality of his performance in office. Could one or two votes have made the difference here? The public is entitled to the information that would answer that question.

The public also has a right to know how individual judges voted. Circuit judges have on occasion been appointed to the Supreme Court — even Ninth Circuit judges. The votes on en banc calls constitute a part of a circuit judge's performance of his judicial duties. The votes may provide an indication of how certain judges would perform on the highest court, particularly with respect to the granting of writs of certiorari. In any event, the public has a right to know how each judge who has life tenure has performed all aspects of his judicial functions. Public scrutiny and accountability are the only checks there are on us, other than impeachment.

Finally, the disclosure of the votes of individual judges might reveal whether there are discernible patterns to the outcome of our en banc calls. It could shed light on whether our votes are consistently based on ideological lines and whether there is a pattern in our voting that is related to the party affiliation of the presidents who appointed us. That information would clearly be of interest to students of the judicial system, and, given that so many of our en banc calls involve controversial cases, probably the public and members of the political branches of government as well.

To me, the reasons for disclosure are obvious and irrefutable. I particularly regret that in this case, which is of such public concern, the rules prevent the disclosure of information to which the public is so clearly entitled.

O'SCANNLAIN, Circuit Judge, specially concurring in the dissent, with whom T.G. NELSON and KLEINFELD, Circuit Judges, join:

With the exception of Part IV, I am delighted to concur in Judge Reinhardt's dissent. While desirability of disclosure of

en banc voting results is a worthy topic for discussion, I am not convinced this is the appropriate forum.

APPENDIX 3

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. STACEY C. KOON, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50561 93-50608 D.C. No. CR-92-00686-JGD-1
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *Cross-Appellant,* v. LAURENCE M. POWELL, *Defendant-Appellant,* *Cross-Appellee.*	Nos. 93-50562 93-50609 D.C. No. CR-92-00686-JGD-2 ORDER AND AMENDED DISSENT AND CONCURRENCE

Filed January 12, 1995
Amended February 2, 1995

Before: James R. Browning and Betty B. Fletcher, Circuit Judges, and James M. Fitzgerald,* District Judge.

*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

ORDER

The dissent from the order denying rehearing en banc filed January 12, 1995 is amended as follows.

Immediately after Slip op. 367, line 4, insert the following:

Of course, the Supreme Court may yet provide Judge Davies with the guidance that our own court has refused to offer. I note in this regard that the panel's decision squarely conflicts with the considerably more flexible approach adopted by the First Circuit in a comprehensive opinion authored by then-Chief Judge Breyer, a leading member of the initial Sentencing Commission. *See United States v. Rivera*, 994 F.2d 942, 952 (1st Cir. 1993).

Rivera holds that the Guidelines do permit departures for personal or professional consequences of conviction that are unusual. *Id.* at 953-56. Moreover, it concludes that apart from a small number of factors "expressly prohibited" (as opposed to "discouraged") by the Guidelines, a district court may depart on the basis of any factor the presence of which is "out of the ordinary" or "unusual." *Id.* at 953. Finally, *Rivera* holds that appellate courts should defer to a district court's determination that a case is "unusual" because such a finding will "*not* involve a 'quintessential legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or ordinary, ordinary or not ordinary, and to what extent." *Id.* at 951-52 (emphasis in original). In all three respects, Judge Breyer's approach in *Rivera* is squarely at odds with the inflexible and far stricter approach adopted by the panel in this case.

Given the frequency with which district judges are faced with the type of question that now confronts Judge Davies, and given the conflict within the circuits created by the panel's opinion, perhaps the Supreme Court will deem it

important to clarify the extent of the authority that sentencing judges possess to depart downwardly from the Guidelines.

REINHARDT, Circuit Judge, dissenting, with whom PREGERSON, WIGGINS, KOZINSKI, NOONAN, and HAWKINS, Circuit Judges, join, and with whom O'SCANNLAIN, T.G. NELSON, and KLEINFELD, Circuit Judges, join, except as to Part IV:

I dissent from the refusal to rehear this case en banc. While I agree that there is no prejudicial error that requires reversal of the convictions, I believe that the panel seriously erred in vacating the downward departures ordered by Judge Davies. In my opinion, the district court acted well within its discretion in sentencing the defendants to prison terms below the Guidelines range. Sergeant Koon and Officer Powell were first-time offenders. The sentences ordered by Judge Davies were severe indeed. Neither law nor justice requires that they be set aside or that any longer prison terms be imposed.

In stretching to reach its result, the panel casts aside the basic principles that should underlie judicial sentencing, even in the age of the Guidelines. It is only by exhalting the rigid calculations of charts and tables over the judgment of human beings that the panel reaches its conclusion that Judge Davies was too lenient. The panel's encroachment on district court discretion epitomizes the mechanical and inflexible approach to sentencing that so many critics contend the Guidelines themselves represent.[1] Indeed, under the panel's view of the district judge's role in sentencing, district courts would be

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[1] *See e.g.* Hon. Jose A. Cabranes, *Sentencing Guidelines: A Failed Utopian Experiment*, Nat'l L. J., July 27, 1992 at 2 (Circuit Judge, United States Court of Appeals for the 2d Circuit); Hon. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 357 (1992) (U.S. District Judge, Eastern District of New York).

divested of much of the limited discretion they retain under the Guidelines. As a result, the panel's opinion would make far worse an already unfair and unjust sentencing scheme. It is difficult to believe that the panel truly wishes such an approach to apply to defendants generally.

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permits it to act in a more humane and reasonable manner than the Guidelines would otherwise allow.

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The panel at no point considered the interplay of the various factors that Judge Davies considered. Instead, it assessed each of the factors independently and concluded in each instance that it would be inconsistent with the Guidelines to depart downward on the basis of that isolated factor — notwithstanding the fact that *none* of them was a *prohibited* factor. The panel then rejected the combination of factors on the basis that each one constituted an inappropriate basis for departure. No combination departure could survive this divide and conquer method of review.

A clear example of the panel's erroneous approach is found in its discussion of the vulnerability to prison abuse issue. The panel rejected Judge Davies' consideration of this factor on the ground that "the number of defendants who might qualify for *this departure* is virtually unlimited . . . ." Slip op. at 9431 (emphasis added). The term "this departure" is clearly incorrect. There was *no departure* based on the factor that the panel is discussing. The departure at issue was based on a combination of factors that included as only one element the potential for prison abuse. The number of persons who would be affected by the combination of factors would *not* be

"virtually unlimited." To the contrary, the number would be small indeed. Thus, the panel's statement as to the number "who might qualify" is just plain wrong. It reaches its mistaken conclusion only because it violated *Cook*'s clear command and considered one factor in the combination "abstractly and alone." *Cook*, 938 F.2d at 153. Far more important, however, it is this method of analysis that permeates the panel's opinion and leads it, inevitably, to the wrong result.

The panel's discussion of the *kinds* of factors that Judge Davies considered in his three-point departure gives rise to even more serious problems. Some of our cases have held that only factors that relate to the offender's culpability or to the nature of the offense may justify departure. *See, e.g., United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990). Others have reached precisely the opposite conclusion. *See, e.g., United States v. Crippen*, 961 F.2d 882, 885 (9th Cir. 1992). The panel fails to reconcile these irreconcilable positions.

Although the panel's opinion purports to endorse the highly restrictive view set forth in *Alvarez-Cardenas*, in the end it only adds to the chaos in our case law. Following *Alvarez-Cardenas*, the opinion flatly states that "personal and professional consequences" of a conviction "are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors." Slip. op. at 9427. However, that statement, while consistent with *Alvarez-Cardenas*, conflicts squarely with *United States v. Mondello*, 927 F.2d 1463, 1469-70 (9th Cir. 1991) (stating that the effect of imprisonment on the offender's family *is* a permissible basis for departure); *see also* § 5H1.6. Perhaps because it recognized the conflict in our cases, or perhaps because it perceived the gross unfairness of its position, the panel substantially undermines the statement by announcing that it does "not intend to imply that factors that do not speak to" the nature of an offense or culpability "are *never* relevant." Slip

op. at 9427 n.3 (emphasis in original). Such conflicting pronouncements within the same opinion cannot help district judges who must administer the Guidelines and make sense of our holdings; nor should they stand as the law of this circuit.

Moreover, the panel's statements that the "personal and professional consequences" of a conviction may not be considered constitutes a square rejection of the holding we announced in *United States v. Aguilar*, 994 F.2d 609, 643-45 (9th Cir. 1993) (opinion of O'Scannlain, J.), *op. withdrawn*, 11 F.3d 124 (1993), and *op. replaced on reh'g en banc*, 21 F.3d 1475 (1994). In *Aguilar*, Judge O'Scannlain, in the part of his opinion joined by Judge Hug, explained that district courts have discretion to depart downward from the Guidelines on the basis of the "additional punishment" beyond imprisonment that a conviction may impose. *Id.* at 643.

The panel does not address *Aguilar*'s reasoning. While the panel is correct that the original panel opinion in *Aguilar* no longer represents binding precedent, it is surely wrong in concluding that the opinion therefore merits no more than a dismissive half-sentence reference to that fact. Slip op. at 9425. The en banc court reheard the case and reversed Aguilar's conviction; accordingly, it did not reach the sentencing question. As a result, the court as a whole never expressed any doubt as to the correctness of Judge O'Scannlain's extensive and perceptive discussion of downward departures. Unlike the panel here, Judge O'Scannlain saw no reason to prohibit sentencing judges from taking into account the practical effects of sentences on the lives of affected individuals. As his opinion made clear, the Guidelines were not intended to treat human beings as impersonal objects whose fate was to be determined solely on the basis of statistical surveys.

Judge O'Scannlain's opinion in *Aguilar* was still binding at the time Judge Davies imposed the sentences on Koon and Powell. Accordingly, he acted properly in basing the sentenc-

ing decision on that holding. *Koon*, 833 F. Supp. at 789.[2] At the time of sentencing, our law was clear that "additional punishment" did constitute a proper basis for a downward departure. At a minimum, Judge Davies, as well as other district judges, are entitled to an explanation from the panel as to why we are so abruptly rejecting the *Aguilar* reasoning. So, too, are the defendants who were properly sentenced under the law as it existed at the time of sentencing only to find that on appeal a panel of our court adopted a different view that requires them to be resentenced under a harsher standard.[3] In my opinion, the panel was not justified in peremptorily dismissing a reasoned analysis that bears so directly on the issues in this case and has such drastic consequences for these and other defendants.

II.

The panel's analysis of the five-point departure, like its analysis of the three-point departure, is premised on a highly restrictive and inflexible reading of the Guidelines and a view hostile to the district court's proper role in sentencing. Judge Davies based his five-point downward departure on his finding that there was victim misconduct. *Koon*, 833 F. Supp. at

[2]*Aguilar* was not taken en banc until almost a month after Judge Davies filed his opinion.

[3]The fact that Koon and Powell will now be resentenced under a stricter interpretation of the Guidelines than existed at the time of their initial sentencing may itself constitute a circumstance to be considered at resentencing. While the change in our case law may not be enough in itself to justify a downward departure, the sentencing judge may want to consider the psychological and emotional effect on the defendants of the change in our law. Both defendants were initially properly sentenced to shorter terms under a rule of law that was valid at the time. There is a certain expectancy that results from such a circumstance. Each defendant now faces a potentially harsher prison term only because the sentencing rules have been changed as the result of the government's appeal. Ironically, the panel's decision may thus have the effect of creating a new "specter of unfairness" which could be considered, consistent with the Guidelines, as one of the factors in a combination justifying departure.

787. The panel accepted this finding; accordingly, our analysis must start from that premise, correct or not. The Guidelines specifically provide for downward departures when victim misconduct "contribute[s] significantly to provoking the offense behavior." § 5K2.10. The panel reversed Judge Davies' departure, holding that, in the context of excessive force cases, an act provokes only if it precipitates an immediate response. Slip op. at 9437. Here, again, the panel erred.

The applicable policy statement plainly rejects the requirement of a tight nexus between the provocative behavior and the resulting unlawful conduct. The policy statement specifically instructs a district court to consider "*any other relevant conduct* by the victim that substantially contributed to the danger presented." § 5K2.10(e) (emphasis added). Moreover, it suggests that a departure may be warranted if the unlawful behavior follows an "*extended course* of provocation and harassment." *Id.* (emphasis added).

Having erroneously concluded that provocation encompasses only a very limited range of acts, the opinion surmises that in fact Judge Davies must have based the departure on the volatility of the arrest. The panel then proceeds to explain why volatility *never* constitutes a permissible ground for departure in an excessive force case — although it can point to no guideline language that would support such an absolutist view. Slip op. at 9438-39. In short, the panel's treatment of the five-point departure is dictated less by the language or spirit of the Guidelines than by hostility to Judge Davies' decision to depart.

III.

Our cases adopt two contradictory general approaches to downward departures. One approach emphasizes the importance of the district court's discretion to depart and stresses that the guidelines "were not meant to be a straightjacket for district judges." *Cook*, 938 F.2d at 152; *United States v.*

Garza-Juarez, 992 F.2d 896, 911 (9th Cir. 1993). The other takes a narrow view of the sentencing judge's role and severely limits the circumstances that justify departure. *See, e.g., Alvarez-Cardenas*, 902 F.2d at 737. For reasons that still confound me, in this case the panel casts its lot with the restrictive approach.

In choosing to apply a highly limited view of judicial discretion to the case of Koon and Powell, the panel accomplishes little except to undo a perfectly proper sentence, and to treat the defendants in a harsh and unfair manner. Certainly, the panel does nothing to resolve the underlying conflict in our case law. Only an en banc panel can do that in any event. As of today, our rules remain unclear and district judges are left with little guidance. They will simply have to do their best to determine which of our cases — and which of the contradictory statements in the panel's opinion — are to be followed in particular circumstances.

As a result of our refusal to take this case en banc, all Judge Davies will know with certainty on remand is that in order to depart from the Guidelines, he must point to "a legitimate sentencing concern," slip op. at 9427 & 9434, and must consider factors that are consistent with the "structure and purposes of the Guidelines," slip op. at 9424. The conflicting definitions we have given to these virtually empty phrases will leave Judge Davies without specific guidance when he decides whether to depart downwardly once again. If after reexamining all of the facts and circumstances in this most regrettable case, he again concludes that there are factors present that warrant a downward departure from the Guidelines, he will only be able to do his duty as he himself sees it. I hope that this time any exercise of the discretion he is supposed to possess will be examined with greater understanding and solicitude.

Of course, the Supreme Court may yet provide Judge Davies with the [illegible]nce that our own court has refused to

offer. I note in this regard that the panel's decision squarely conflicts with the considerably more flexible approach adopted by the First Circuit in a comprehensive opinion authored by then-Chief Judge Breyer, a leading member of the initial Sentencing Commission. *See United States v. Rivera*, 994 F.2d 942, 952 (1st Cir. 1993).

Rivera holds that the Guidelines do permit departures for personal or professional consequences of conviction that are unusual. *Id.* at 953-56. Moreover, it concludes that apart from a small number of factors "expressly prohibited" (as opposed to "discouraged") by the Guidelines, a district court may depart on the basis of any factor the presence of which is "out of the ordinary" or "unusual." *Id.* at 953. Finally, *Rivera* holds that appellate courts should defer to a district court's determination that a case is "unusual" because such a finding will "*not* involve a 'quintessential legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or ordinary, ordinary or not ordinary, and to what extent." *Id.* at 951-52 (emphasis in original). In all three respects, Judge Breyer's approach in *Rivera* is squarely at odds with the inflexible and far stricter approach adopted by the panel in this case.

Given the frequency with which district judges are faced with the type of question that now confronts Judge Davies, and given the conflict within the circuits created by the panel's opinion, perhaps the Supreme Court will deem it important to clarify the extent of the authority that sentencing judges possess to depart downwardly from the Guidelines.

IV.

As a final point, I note that once again, consistent with our longstanding policy, we refuse to disclose to the public important information regarding an official action of this court. Following an en banc vote, we only tell the public whether or not

the en banc call carried. We refuse to disclose whether a decision not to go en banc was made by an equally divided court or whether only a single judge wished to reconsider the panel's decision. We also refuse to disclose how individual judges cast their ballots.[4] By these rules, we immunize our individual actions from public scrutiny. In my opinion, we are wrong to do so. The public has a right to know how all public officials, including judges, conduct the public's business.

I am aware of the arguments in favor of the rule that we have adopted. It is possible that a vote for or against en banc review will be misconstrued by the public as constituting agreement with or opposition to the merits of the opinion in question even though a judge has cast his ballot on entirely different grounds. However, the fact that a public action may be misunderstood is not a reason for suppressing information. Whatever the costs of disclosure may be, I have no doubt that the costs of secrecy are greater.

I have addressed the problems of non-disclosure of en banc votes before. Previously, I noted that the public is often deprived of crucial information regarding death penalty cases. *See Brewer v. Lewis*, 997 F.2d 550 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of en banc review); *Harris v. Vasquez*, 949 F.2d 1497, 1539 (9th Cir. 1990). I have also noted that our rule of secrecy is equally indefensible in other

[4]Under our rules, all active judges are permitted to vote on en banc calls and a call fails unless a majority of the non-recused judges cast affirmative votes. Our rules do not permit judges who wish to record their votes to do so. Instead, judges may inform the public of their votes only through their participation in dissents from denials of suggestions for rehearing en banc. Many judges prefer not to join in published opinions expressing disagreement with procedural actions of this court, even when those actions determine the outcome of important cases. As I have noted before, our rule ensures that the public knows even less about our en banc process than it does about the Supreme Court's decisions with respect to granting certiorari. *See Harris v. Vasquez*, 949 at 1539 (explaining that Supreme Court Justices are always permitted to make public their votes on petitions for certiorari).

cases that involve questions of great public interest. *See Elder v. Holloway*, 984 F.2d 991, 1000 (9th Cir. 1993) (Reinhardt, J., dissenting) (disagreeing with the rule precluding disclosure of en banc votes in the context of a civil right case).

Indeed, it is usually the most controversial cases — and the ones that are likely to have the widest impact on the public — that are the subject of the most fiercely debated en banc calls. The votes cast in them are clearly of concern to the public. The people have a right to know both how close the decision is on our en banc votes and how each judge voted on particular calls.

Information about the numerical outcome of the votes is necessary in order for the public, the legal community, and the academic world to assess the en banc process itself. For example, it would surely be of interest to those who study the courts if a series of en banc calls failed even though supported by a majority of the judges who actually voted. With such information, court observers could evaluate the soundness of our voting procedures and suggest reforms. There is another reason that readily comes to mind. There are several vacancies on this court. In fact, one seat has been vacant for well over two years. Disclosure of the numerical outcome of our en banc votes would assist the public in determining the practical impact on our operations of the president's inexplicable failure to perform his constitutional duties expeditiously and to better assess the quality of his performance in office. Could one or two votes have made the difference here? The public is entitled to the information that would answer that question.

The public also has a right to know how individual judges voted. Circuit judges have on occasion been appointed to the Supreme Court — even Ninth Circuit judges. The votes on en banc calls constitute a part of a circuit judge's performance of his judicial duties. The votes may provide an indication of how certain judges would perform on the highest court, particularly with respect to the granting of writs of certiorari. In

any event, the public has a right to know how each judge who has life tenure has performed all aspects of his judicial functions. Public scrutiny and accountability are the only checks there are on us, other than impeachment.

Finally, the disclosure of the votes of individual judges might reveal whether there are discernible patterns to the outcome of our en banc calls. It could shed light on whether our votes are consistently based on ideological lines and whether there is a pattern in our voting that is related to the party affiliation of the presidents who appointed us. That information would clearly be of interest to students of the judicial system, and, given that so many of our en banc calls involve controversial cases, probably the public and members of the political branches of government as well.

To me, the reasons for disclosure are obvious and irrefutable. I particularly regret that in this case, which is of such public concern, the rules prevent the disclosure of information to which the public is so clearly entitled.

O'SCANNLAIN, Circuit Judge, specially concurring in the dissent, with whom T. G. NELSON and KLEINFELD, Circuit Judges, join:

With the exception of Part IV, I am delighted to concur in Judge Reinhardt's dissent. While desirability of disclosure of en banc voting results is a worthy topic for discussion, I am not convinced this is the appropriate forum.

Supreme Court, U.S.
FILED
JUN 19 1995
OFFICE OF THE CLERK

(3)

Nos. 94-1664 and 94-8842

In the Supreme Court of the United States

OCTOBER TERM, 1994

STACEY C. KOON, PETITIONER

v.

UNITED STATES OF AMERICA

LAURENCE M. POWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in exercising de novo review over the district court's downward departures under the Sentencing Guidelines.

2. Whether the court of appeals applied the correct legal standard in finding that testimony of a government witness was not tainted by exposure to compelled statements made by petitioners.

3. Whether the jury was properly instructed on the count charging petitioner Koon with depriving the victim in this case of his right to be kept free from harm while in official custody.

4. Whether successive state and federal prosecutions of petitioners for the same conduct violated the Double Jeopardy Clause.

5. Whether a remark made by government counsel in closing argument constituted plain error.

6. Whether the admission of the videotape of co-defendant Briseno's testimony from the state trial violated the Confrontation Clause.

7. Whether the jury was properly instructed on the element of willfulness.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-79a)[1] is reported at 34 F.3d 1416. The sentencing opinion of the district court (Pet. App. 94a-138a) is reported at 833 F. Supp. 769.

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[1] "Pet. App." references are to the appendix to the petition in No. 94-1664.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1994. The petitions for rehearing were denied on January 12, 1995. Pet. App. 80a-81a. Koon's petition for a writ of certiorari was filed on April 10, 1995. Powell's petition for a writ of certiorari was filed on April 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner Powell was convicted of willfully striking Rodney King during his arrest, in violation of 18 U.S.C. 242. Petitioner Koon was convicted of willfully permitting other police officers to strike King during his arrest, in violation of 18 U.S.C. 242. Petitioners were sentenced to 30 months' imprisonment. The court of appeals affirmed the convictions, but vacated the sentences and remanded for sentencing.

1. In the early morning hours of March 3, 1991, Rodney King was speeding on a freeway in Los Angeles, California. Los Angeles Police Department (LAPD) officers pursued King. The pursuit ended when King pulled his car over at an entrance to the Hansen Dam recreation area. Petitioner Powell was one of the LAPD officers who pursued King. Petitioner Koon, an LAPD sergeant, arrived after the pursuit had ended, and took command of the scene. Pet. App. 2a.

Officers ordered King and his two passengers to get out of the car and assume a felony. prone position, *i.e.* to lie face down on the ground, with arms and legs spread. The two passengers complied with the officers' instructions. King got out of the car, but did

not lie down. Eventually, King got down on his hands and knees but did not assume the felony prone position. Four officers, including Powell, attempted to force King into that position. King resisted, and the officers retreated. Koon fired two taser darts from an electric stun gun into King. Pet. App. 2a.

The events that followed were captured on the Holliday videotape, which was an exhibit at trial. As the videotape begins, it shows that King rose from the ground in an attempt to escape. When he charged in Powell's direction, Powell struck King with his baton. Powell and another officer continued to strike King with their batons, and King fell to the ground. From the 18th to the 30th second on the tape, King attempted to get up, and Powell and the other officer again struck King with their batons. Pet. App. 2a-3a.

From the 35th to the 51st second, Powell repeatedly struck King with his baton. At approximately the 43d second, one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest, and King rolled onto his stomach and lay prone. At that point, the officers stepped back and observed King for approximately ten seconds. Powell began to reach for his handcuffs. Pet. App. 3a.

At 1:07 on the video tape, officer Briseno stomped on King. After King writhed in response, Powell and another officer hit King with a series of baton blows. At approximately 1:29, King put his hands behind his neck and he was then handcuffed. King was treated at the hospital for a fractured right leg, multiple facial fractures, and multiple bruises and contusions. Pet. App. 3a.

Petitioners and two other officers were tried in state court in Simi Valley, California, on charges of assault with a deadly weapon and excessive use of force

by a police officer. The four officers were acquitted on all charges, except for one count against Powell that resulted in a hung jury. Pet. App. 4a.

2. Thereafter, petitioners and the other two officers were indicted by a federal grand jury. Powell and the other two officers were charged with willfully using unreasonable force during the arrest, in violation of 18 U.S.C. 242. Koon was charged with willfully permitting the other officers to strike King, in violation of 18 U.S.C. 242. After a trial, a jury convicted petitioners and acquitted the other two officers. Pet. App. 4a.

Petitioners' offense level and Criminal History Category led to a prescribed sentencing range of 70-87 months' imprisonment. The district court awarded a five-level and a three-level departure, however, which led to a prescribed range of 30-37 months. The district court then sentenced petitioners to 30 months' imprisonment. Pet. App. 94a-138a.

The court awarded a five-level downward departure under Sentencing Guidelines § 5K2.10, reasoning that King's misconduct had provoked petitioners' initial use of force and that the incident involved a "dynamic arrest situation." Pet. App. 57a, 121a-124a, 132a. The court granted an additional three-level downward departure based on three factors: (1) the additional punishment resulting from petitioners' loss of their jobs and susceptibility to abuse in prison; (2) the absence of a need to protect the public from further criminal activity; and (3) the "specter of unfairness" resulting from successive state and federal prosecutions for the same conduct. *Id.* at 124a-131a.

3. The court of appeals affirmed petitioners' convictions. The court vacated petitioners' sentences,

however, and remanded for resentencing. Pet. App. 1a-79a.

The court first held that the admission of a videotape recording of co-defendant Briseno's state court testimony did not violate the Confrontation Clause because petitioners had an adequate opportunity to cross-examine Briseno at the state court trial. Pet. App. 4a-9a. The court rejected petitioners' contention that they lacked such an opportunity because they did not have access to enhancements to the Holliday videotape. *Id.* at 7a-8a. The court explained that petitioners' "failure to take full advantage of their opportunity to cross-examine in the first trial—by developing those tools earlier—cannot alter the fact that they *had* the opportunity." *Id.* at 8a.

The court also rejected petitioners' contention that Briseno's testimony was tainted because he was exposed to compelled statements made by petitioners to the LAPD Internal Affairs Division. Pet. App. 14a-20a. The court held that the government's burden under *Kastigar* v. *United States*, 406 U.S. 441 (1972), was to show that "each matter as to which the witness will testify is derived from a source independent of the immunized testimony." Pet. App. 15a-16a. The court held that the government had satisfied that burden by showing that Briseno was an eyewitness to the events. *Id.* at 20a. The court also noted that Briseno had access to numerous other legitimate sources to refresh his testimony, including the Holliday videotape and petitioners' own state court testimony. *Ibid.*

The court next held that the successive state and federal prosecutions of petitioners did not violate the Double Jeopardy Clause. Pet. App. 30a-32a. The court noted that this Court has held that the Double Jeopardy Clause permits successive prosecutions of

the same conduct by different sovereigns. *Id.* at 30a. While the Ninth Circuit recognizes an exception to the dual sovereignty rule where the second prosecution is a "sham" pursued on behalf of the first sovereign, the court found no evidence of such a "sham" in this case. *Id.* at 30a-32a.

The court rejected petitioners' contention that certain remarks in the government's closing argument, to which they did not object at trial, constituted plain error. Pet. App. 40a-45a. The court found that only one of the challenged remarks was improper—an observation that the Holliday videotape had caused "horror and outrage" from "Paris to Tokyo." *Id.* at 44a. That remark, the court concluded, did not constitute plain error, because it was isolated, the jury was instructed to base its verdict only on the evidence, and there was substantial independent evidence to support the verdict. *Id.* at 44a-45a.

The court held that the jury was correctly instructed that Koon had a duty to intervene to protect King from an "unreasonable" use of force by other officers, not from force that was "intended as punishment" or "shocking to the conscience." Pet. App. 46a-51a. The court explained that "[b]ecause the third-party actors were officers attempting to make an arrest, Koon's Fourteenth Amendment duties to the custodial subject were to protect against * * * such force as was unreasonable." *Id.* at 50a. The court also held that the jury was correctly instructed that a person is in official custody when a reasonable person would have believed that he or she was not free to leave. *Id.* at 51a-52a. The court concluded that while that standard is derived from a Fourth Amendment case, "the same definition of 'custody' applies in the Fourteenth Amendment context." *Id.* at 51a.

The court further held that the jury had been properly instructed on the element of willfulness. Pet. App. 52a-54a. The court concluded that the instructions made clear that the government was required to show that petitioners acted with the specific intent to violate King's constitutional rights. *Ibid.*

Turning to the sentencing issues, the court first held that none of the factors considered by the district court in awarding a three-level departure was a permissible ground for a departure. Pet. App. 58a-69a. The court concluded that "[p]ersonal and professional consequences that stem from a criminal conviction are not appropriate grounds for departing" because "[t]hey are not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes." *Id.* at 62a. Any attempt to separate collateral consequences that should serve as a ground for a departure from those that should not, the court added, "would be boundless in the moral, social, and psychological examinations it required courts to make" and "can only lead to huge disparities in sentencing." *Id.* at 62a-63a. For similar reasons, the court rejected the view that a departure is permissible when a person's status makes him more susceptible to abuse in prison. *Id.* at 64a-66a. The court explained that the inquiry required by such a departure ground is both "subjective and open-ended" and "the number of defendants who might qualify * * * is virtually unlimited." *Ibid.* The court held that a departure because petitioners are unlikely to engage in future unlawful conduct was unwarranted since the lower limit of Criminal History Category I is set for an offender with the lowest risk of recidivism. *Id.* at 67a-68a. Finally, the court concluded that the "specter of unfairness" of dual

prosecutions was not a permissible departure ground "because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern." *Id.* at 68a-69a. The court added that recognizing such a departure ground in this case would undermine the Attorney General's determination that a distinct federal interest warranted a second prosecution. *Id.* at 69a.

The court also held that a five-level departure for victim misconduct was not justified because the district court found that King's misconduct provoked only the initial use of force, not petitioners' unlawful conduct. Pet. App. 70a-71a. The court further held that the volatility of the incident in conjunction with the initial provocation also did not furnish a ground for departure. *Id.* at 72a-73a. The court reasoned that such volatility is incorporated "into the basic fabric of the law in this area," and is therefore "typical—not unusual." *Id.* at 73a. The court noted that ordinary provocation can be a mitigating factor when assault is committed by a civilian. It held, however, that because the Guidelines treat assaults committed by public officials more seriously than assaults committed by civilians, only extreme provocation would justify a departure when the defendant is a public official. *Id.* at 76a & n.38.

The panel voted to deny rehearing, and the full court voted to deny the suggestion for rehearing en banc. Pet. App. 80a-81a. Judge Reinhardt, joined by eight other judges, would have granted rehearing en banc on the sentencing issues. *Id.* at 81a-93a.

ARGUMENT

1. Petitioners contend (Koon Pet. 12-18; Powell Pet. 32-41) that the court of appeals erred in failing to

defer to the district court's decision to depart downward from the sentencing range specified by the Sentencing Guidelines. That contention is without merit.

As the court of appeals concluded (Pet. App. 58a-69a), the factors relied upon by the district court to justify its three-level departure are not permissible grounds for a departure. In particular, the personal and professional consequences that stem from a criminal conviction are not appropriate grounds for departing because "[t]hey are not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes," and because permitting departures on those grounds "can only lead to huge sentencing disparities." *Id.* at 62a-63a. A departure based on the susceptibility of police officers to abuse in prison would be inconsistent with the purposes of the Guidelines because it provides "an unlimited open-ended rationale for departing," that would be equally available to gang members, police informants, and child abusers. *Id.* at 65a. A departure based on the unlikelihood of future criminal activity by petitioners is inconsistent with the Guidelines because the lower limit of Criminal History Category I already takes that factor into account. *Id.* at 67a-68a. And a departure based on the perceived unfairness of successive state and federal prosecutions conflicts with the purposes of the Guidelines because that ground "speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern" and because permitting a departure on that ground would undermine the Attorney General's determination that a distinct federal interest warrants a federal prosecution. *Id.* at 68a-69a.

The court of appeals was similarly correct in holding (Pet. App. 70a-76a) that a departure based on victim misconduct was unwarranted in this case. Guidelines § 5K2.10 limits departures based on the victim's misconduct to cases where the misconduct "contribute[s] significantly to provoking the offense behavior." Pet. App. 70a. The district court found that while King's misconduct provoked the initial use of force against King, it did not provoke petitioners' unlawful conduct. *Id.* at 70a-71a. Accordingly, the plain language of Section 5K2.10 does not support a departure based on victim misconduct. In addition, as the court of appeals concluded (Pet. App. 73a), provocation in a volatile arrest setting is a factor that is "built into the most fundamental structure of excessive force jurisprudence." See *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."). For that reason, the excessive force Guidelines Section (§ 2H1.4) necessarily takes that factor into account in typical cases. Pet. App. 73a.

Petitioners contend (Koon Pet. 12; Powell Pet. 32) that the court of appeals' exercise of de novo review over the district court's departure decisions conflicts with the general approach for appellate review of departure decisions set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993). There is, however, no such conflict. In *Rivera*, the First Circuit held that plenary review is appropriate "where the question on review is simply whether or not the allegedly special circumstances (i.e., the reasons for

departure) are of the 'kind' that the Guidelines, *in principle*, permit the sentencing court to consider at all." 944 F.2d at 951. The court also held that plenary review is appropriate where the appellate court performs the "quintessentially legal" function of interpreting the Guidelines in light of their "intention and purpose." *Ibid.* In contrast, the court held that, because a district court is better situated to determine whether the particular circumstances of a case make it unusual, an appellate court must ordinarily defer to such fact-based judgments. *Id.* at 951-952.

The court's exercise of de novo review in this case is consistent with the approach outlined in *Rivera*. As discussed above, the court rejected the district court's three-level departure because it concluded that the factors relied upon by the district court to support that departure are not of the kind that the Guidelines permit a sentencing court to consider at all. And the court rejected the five-level departure for victim misconduct on the basis of its interpretation of the victim misconduct and excessive force Guidelines Sections. Those are the kind of legal determinations that *Rivera* holds are subject to de novo review. To the extent that petitioner seeks review "concerning the appropriate factors to be considered by a district court in determining whether to depart from the Sentencing Guidelines" (Pet. 12), that issue may be resolved by the Sentencing Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1990). It does not warrant review by this Court.

Petitioners also err in contending (Koon Pet. 17; Powell Pet. 39) that the court's decision on the victim misconduct departure conflicts with *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). In that case, the defendant was a woman who stabbed a larger

intoxicated man after he had pushed her, verbally abused her, and publicly humiliated her because she refused to have sex with him. *Id.* at 651. On those facts, the Eighth Circuit held that a departure for victim misconduct was warranted. Unlike the situation here, the district court in *Yellow Earrings* found that the victim's misconduct did not merely precede the defendant's unlawful conduct, but actually provoked it. *Id.* at 652-654. Moreover, the defendant in *Yellow Earrings* was a civilian. That case therefore did not raise any question concerning the circumstances under which victim misconduct should be viewed as a mitigating factor in cases involving the use of excessive force by police officers. For those reasons, *Yellow Earrings* is inapposite here.

2. Koon argues (Koon Pet. 18-21) that the court of appeals applied the wrong standard in deciding that co-defendant Briseno's videotaped state court testimony was not tainted by his exposure to compelled statements that petitioners gave to the Internal Affairs Division of the LAPD. Briseno had obtained those statements because he was facing disciplinary proceedings and he had a right under state law to discovery of all evidence relevant to that proceeding. Pet. App. 20a n.14. Koon's argument is without merit.

a. In *Kastigar* v. *United States*, 406 U.S. 441 (1972), the Court held that the Self-Incrimination Clause of the Fifth Amendment precludes the government from using compelled statements or evidence derived from them in a federal criminal trial. Under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), that protection extends to public employees, such as petitioners, who give statements under a threat of removal from office. Once a defendant demonstrates that he has given a compelled statement, *Kastigar* requires prosecuting

authorities to demonstrate that "their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 406 U.S. at 460.

The standard applied by the court of appeals in deciding that Briseno's testimony was not tainted by his exposure to petitioners' compelled statements is identical to the standard set forth in *Kastigar*. Pet. App. 17a. The court of appeals held that "the prosecution meets its Fifth Amendment burden of proving that compelled testimony is not used against a defendant when it produces a legitimate, wholly independent source for all matters as to which the witness will testify." *Ibid.* As the court stated, that standard "was taken directly from the language in *Kastigar*." *Ibid.*

Applying the independent source standard derived from *Kastigar*, the court correctly concluded that Briseno's testimony was not tainted. As the court explained, "Briseno was an eyewitness to the events at issue in the trial and thus had independent personal knowledge of the events to which he testified." Pet. App. 20a.

b. Koon contends (Pet. 19) that review in this case is warranted because the standard applied by the court of appeals for showing the absence of witness taint conflicts with the standard adopted by the D.C. Circuit in *United States* v. *North*, 910 F.2d 843 (*North I*), modified, 920 F.2d 940 (1990) (*North II*), cert. denied, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (1991), cert. denied, 113 S. Ct. 656 (1992). In those cases, the D.C. Circuit held that the government must show not only that there is an independent source for the testimony of a witness exposed to compelled statements, but also that the

witness has not shaped or altered his testimony in any way, as a result of that exposure. *North II*, 920 F.2d at 942; *North I*, 910 F.2d at 860, 872-873. That rule applies even when, as here, prosecuting authorities play no role in exposing the witness to the compelled statements. *North II*, 920 F.2d at 942, 944-945. As one court has stated, the D.C. Circuit's standard constitutes "the most expansive reading of the Fifth Amendment to date regarding the evidentiary use of immunized testimony." *United States* v. *Helmsley*, 941 F.2d 71, 82 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992).

For several reasons, the conflict claimed by petitioners does not warrant this Court's review. First, in this case, petitioners testified in the state court trial before Briseno testified, and the content of their testimony was substantially the same as the content of their compelled statements. Pet. App. 20a; Gov't C.A. Br. 24 & Addendum. Nothing in the D.C. Circuit decisions suggests that it would apply its standard in such circumstances. To the contrary, the D.C. Circuit implied in *North II* that its rule would not apply when a defendant voluntarily testifies to events he has previously discussed under compulsion. 920 F.2d at 946 n.7. Second, in this case, the district court applied the D.C. Circuit's standard and found that Briseno's testimony was not affected in any way by his exposure to petitioners' compelled statements. Gov't C.A. Br. 17-18, 22-24. Because petitioners cannot benefit from an application of the D.C. Circuit standard, this is not a suitable case for deciding whether that standard is the proper one.

Finally, *North* and *Poindexter* both involved immunity conferred by federal statute, while the present case involves so-called *Garrity* immunity.

The D.C. Circuit has not yet had occasion to decide whether its standard should be extended to the *Garrity* context. As the court of appeals in this case noted, if the D.C. Circuit standard were applied in the *Garrity* context, "police officers could protect each other by compelling testimony and disseminating it widely, placing any criminal prosecution at serious risk and possibly barring prosecution altogether." Pet. App. 19a n.13. The conflict asserted by petitioners therefore does not warrant review in this case.[2]

3. Koon contends (Koon Pet. 22-24) that the district court improperly instructed the jury on the meaning of "unlawful force" and "custody" in connection with the count charging him with depriving King of his Fourteenth Amendment right to be kept free from harm while in official custody. That contention is without merit.

a. In *Logan* v. *United States*, 144 U.S. 263, 284 (1892), this Court held that a person taken into custody has a constitutional right to be protected "against assault or injury from any quarter." More recently, in *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 199-200 (1989), the Court explained that "when the State takes a person into its custody and holds him there against his will, the

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[2] The other circuit court decisions cited by Koon (Pet. 20) are inapposite. *United States* v. *Bartel*, 19 F.3d 1105, 1109-1114 (6th Cir.), cert. denied, 115 S. Ct. 113 (1994), involved the question of what showing the government must make to establish that a grand jury indictment has not been tainted by the grand jury's exposure to compelled statements. *United States* v. *Schmidgall*, 25 F.3d 1523, 1529-1532 (11th Cir. 1994), involved the question of what showing the government must make to establish that government agents have not themselves used compelled statements to shape a witness's testimony.

Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Thus, as the court of appeals held (Pet. App. 46a), once King was in custody, Koon had a duty under the Fourteenth Amendment to protect King from the use of unlawful force by others, including other officers under his command. *United States* v. *Reese*, 2 F.3d 870, 887-890 (9th Cir. 1993), cert. denied, 114 S. Ct. 928 (1994); *United States* v. *McKenzie*, 768 F.2d 602, 604 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986); *Lynch* v. *United States*, 189 F.2d 476, 478 (5th Cir.), cert. denied, 342 U.S. 831 (1951).

Koon contends (Pet. 22-24) that the district court erred in defining the unlawful force from which King had a right to be protected as "unreasonable" force, rather than as force that "amounts to punishment" or that "shocks the conscience." The court's definition was correct, however, because King was subjected to force applied by police officers during an arrest. Under *Graham* v. *Connor*, 490 U.S. 386, 395-397 (1989), the use of force during an arrest is unlawful if it is objectively unreasonable. Koon therefore had a duty to protect King from the use of unreasonable force by the officers under his command.

Koon errs in contending (Koon Pet. 22-23) that the court's decision conflicts with *United States* v. *Cobb*, 905 F.2d 784 (4th Cir. 1990), cert. denied, 498 U.S. 1049 (1991). In that case, the court of appeals held that the Fourteenth Amendment protects a *pretrial detainee* against the use of excessive force that amounts to punishment. 905 F.2d at 788. The court expressly recognized that an arrestee, such as the victim in this case, is protected against the use of unreasonable force. *Id.* at 788 n.7; see also *Graham*, 490 U.S. at 394-395 & n.10 (while arrestees are protected against the

use of unreasonable force, pretrial detainees may only be protected against the use of force that amounts to punishment).

b. Koon's contention (Pet. 23-24) that the jury was improperly instructed on the meaning of custody is similarly without merit. The jury was instructed that a person is in official custody if "a reasonable person in that situation would have believed he or she was not free to leave." Pet. App. 51a. That instruction was drawn directly from this Court's decision in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980). And while *Mendenhall* was a Fourth Amendment case, there is no reason that custody should be defined differently in the Fourteenth Amendment context. See *DeShaney*, 489 U.S. at 199-200 (Fourteenth Amendment right to be free from harm arises when state officials impose a limitation on a person's "freedom to act on his own behalf").

4. Koon contends (Pet. 24-30) that successive state and federal prosecutions of him for the same conduct violated the Double Jeopardy Clause. As Koon recognizes, however, this Court has repeatedly held that "the Constitution does not prohibit successive prosecutions by different sovereigns based on the same conduct." *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1947-1948 n. 22 (1994); see *Heath* v. *Alabama*, 474 U.S. 82 (1985); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922).

Koon contends (Pet. 27-28) that the dual sovereignty doctrine should be reexamined because it is inconsistent with the text and history of the Double Jeopardy Clause. This Court, however, has carefully considered those contentions before and soundly rejected them. The Double Jeopardy Clause provides

that no person shall be twice put in jeopardy for the "same offence." In using the term "same offence," the Framers incorporated the common law conception of crime as an offense against the sovereignty of the government. *Heath*, 474 U.S. at 88. Accordingly, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences'." *Ibid.* The Court "has always understood the words of the Double Jeopardy Clause to reflect this fundamental principle." *Id.* at 93.

Moreover, if the Double Jeopardy Clause were not interpreted in that way, "undesirable consequences would follow." *Abbate*, 359 U.S. at 195. As the Court has explained, "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Ibid.* At the same time, "no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law." *Ibid.* Thus, the dual sovereignty doctrine "is not simply a fiction that can be disregarded in difficult cases. It finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself." *Heath*, 474 U.S. at 92. Koon's contention that the doctrine should be reconsidered is without merit.[3]

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[3] Contrary to petitioner's view (Pet. 29), there is no "potential exception" to the dual sovereignty doctrine for cases in which a federal prosecution follows a state acquittal, rather

5. Powell argues (Pet. 10-18) that a government attorney's statement in closing argument that the Holliday videotape had caused "horror and outrage" from "Paris to Tokyo" impaired his right to a fair trial. Petitioner did not object to those remarks at trial, however. Pet. App. 40a. The court of appeals therefore examined the remarks under a plain error standard. *Ibid.* Finding that the remarks did not materially prejudice the outcome of the trial, the court concluded that they did not constitute plain error. *Id.* at 43a-45a.

In challenging the court of appeals' conclusion, Powell does not suggest that the court applied the wrong legal standard for assessing plain error. Instead, he argues only that the court came to the wrong conclusion based on the facts of this case. That fact-bound contention raises no issue of general importance and therefore does not warrant this Court's review.

In any event, the court of appeals correctly concluded that the remarks did not constitute plain error. As the court of appeals explained (Pet. App. 44a-45a), the improper remarks consisted of "a few sentences from a trial that lasted over a month and from detailed closing arguments that lasted many hours"; government counsel, defense counsel, and the district court all "admonished the jurors to base their verdict only on the evidence before them"; there was

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than a state guilty verdict. As discussed above, the dual sovereignty doctrine rests on the view that state and federal prosecutions for the same conduct are not prosecutions for "the same offence" within the meaning of the Double Jeopardy Clause. It is therefore irrelevant whether the initial state prosecution results in a guilty verdict or an acquittal.

"substantial independent evidence to support a finding of guilt"; and the acquittal of two of the defendants indicated that the jury was able to weigh the evidence "without prejudice." In those circumstances, the remarks did not materially affect the jury's ability to decide the case on the basis of the evidence before it.[4]

6. Powell argues (Pet. 18-22) that the admission of Briseno's videotaped state court testimony violated his rights under the Confrontation Clause. That argument is without merit.

Federal Rule of Evidence 804(b) permits the introduction of prior testimony if the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Because Rule 804(b) embodies a firmly rooted exception to the hearsay rule (see *Mattox* v. *United States*, 156 U.S. 237 (1895)), if testimony is admissible under that Rule, its admission is consistent with the Confrontation Clause. *Bourjaily* v. *United States*, 483 U.S. 171, 182-183 (1987).

As the court of appeals concluded (Pet. App. 5a-9a), Briseno's state court testimony was admissible under Rule 804(b). The state court did not interfere in any way with petitioners' ability to cross-examine Briseno, and since the issues in that trial were substantially similar to the issues in this case, peti-

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[4] Powell asserts (Pet. 11, 15-18) that several other remarks made by government counsel were improper. As the court of appeals concluded, however, each of those remarks was properly designed to persuade the jury that petitioners' conduct was unreasonable, and that the jury was the ultimate arbiter of that issue. Pet. App. 40a-42a.

tioners had a similar motive to develop Briseno's testimony. *Id.* at 7a-9a.

Powell contends (Pet. 18 & n.27) that he did not have an adequate opportunity to cross-examine Briseno at the state trial because he did not have access to enhancements to the Holliday video tape that might have made his cross-examination of Briseno more effective. Those enhancements, Powell points out, were not developed until after the state court trial. *Ibid.* But as the court of appeals explained (Pet. App. 8a), petitioners' "failure to take full advantage of their opportunity to cross-examine in the first trial—by developing [the enhancements] earlier—cannot alter the fact that they *had* the opportunity." The admission of Briseno's state court testimony therefore did not violate the Confrontation Clause.

7. Finally, Powell argues (Pet. 22-32) that the court of appeals erred in approving the district court's jury instructions on the definition of willfulness. In Powell's view (Pet. 24-25), the instructions were improper because they permitted the jury to convict on the basis of acts that were merely volitional rather than on the basis of acts undertaken with the specific intent of violating King's rights to be free from unreasonable force. See *Screws* v. *United States*, 325 U.S. 91, 107 (1945) (to act willfully under 18 U.S.C. 242, the defendant must have had "the purpose to deprive the [victim] of a constitutional right").

The jury was specifically instructed that "an act is done willfully if it is done voluntarily and intentionally, *and* with a specific intent to do something th[e] law forbids; that is, with an intent to violate a protected right." Pet. App. 52a (emphasis added). The jury was further instructed that "the required specific intent is the intent to use more force than is

reasonable under all of the circumstances," *ibid.*, and that the defendant must have "intended to accomplish that which the Constitution forbids." *Id.* at 53a. Those instructions clearly informed the jury that to satisfy the willfulness element the government was required to show not only that Powell intended to use force, but also that he intended for the force to be unreasonable. Accordingly, the court of appeals correctly rejected the claim that the instructions "allow[ed] the jury to convict on the basis of acts which were merely volitional, rather than undertaken with the specific intent to violate King's rights," *ibid.*, and that holding warrants no further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1995

(9) (H)

FILED
NOV 9 1995
CLERK

Nos. 94-1664, 94-8842

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STACEY C. KOON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

LAURENCE M. POWELL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed April 17, 1995
Certiorari Granted September 27, 1995

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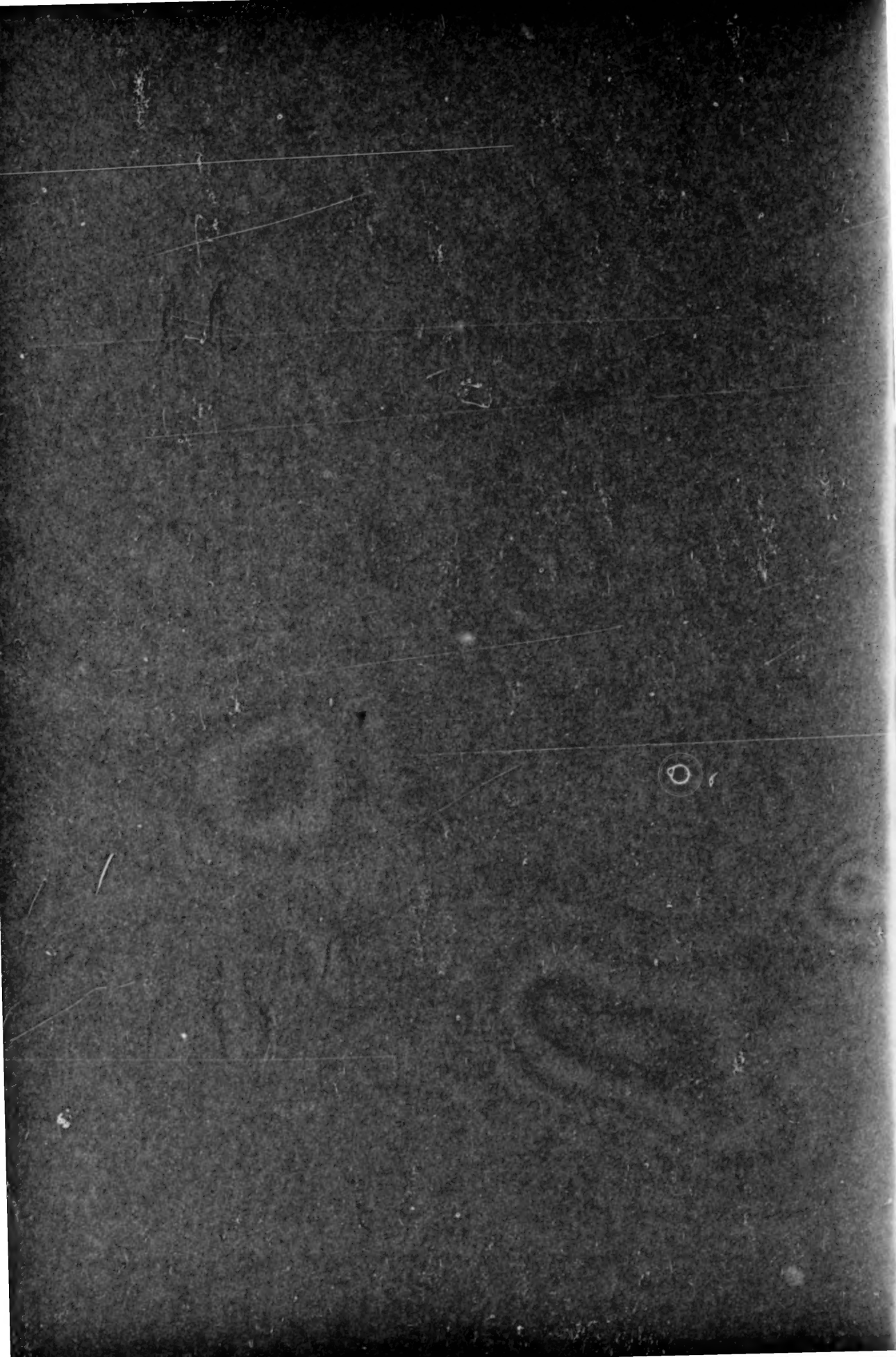

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* The opinions and orders of the District Court and the Court of Appeals relevant to the proceedings in this Court are printed in the appendix to each of the petitions for writ of certiorari and therefore have not been reproduced herein.

RELEVANT DOCKET ENTRIES FROM THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

8/4/92	1	INDICTMENT counts filed against Stacey C. Koon (1) count(s) 2, Laurence M. Powell (2) count(s) 1, Timothy E. Wind (3) count(s) 1, Theodore J. Briseno (4) count(s) 1 filed by AUSA Steven Clymer (cshl) [Entry date 08/07/92]
2/16/93	268	MINUTES: J/T 1st day. Voir dire exam of prospective jury pool commenced. Furth jury selection is cont to 2/2/93 [sic] at 8:30 am. C/R: Beverly Casares by Judge John G. Davies (mc) [Entry date 03/03/93]
2/25/93	274	MINUTES: J/T 8th day. Opening stmts made by govt and dfts 1, 2, and 4. [Entry date 3/3/93]
4/10/93	330	MINUTES: 39th day of jury trial cont to 4/11/93 at 12:00 p.m. Closeing [sic] argu made. Crt instru jury. Baliff/matron sworn. Closeing [sic] argu were made by atty Mr. Braun on behalf of dft Briseno, and rebuttal argu were made by govt's cnsl. C/R: B. Casares and C. Lee by Judge John G. Davies (dj) [Entry date 4/16/93]
4/17/93	342	VERDICT as to Stacey C Koon (dj) [Entry date 4/22/93]

4/17/93	343	VERDICT as to Laurence M. Powell (dj) [Entry date 4/22/93]
7/9/93	391	SENTENCING memorandum re Stacey C. Koon, Laurence M. Powell, plaintiff USA (dj) [Entry date 07/09/93]
7/29/93	402	ntc of filing under seal as to dft Laurence M. Powel (lj) [Entry date 08/03/93]l
7/30/93	405	Suppl sent memo subm on behalf of dft Stacey C. Koon (dj) [Entry date 08/03/93]
8/3/93	407	Ntc of under seal filing of reply to dft Koon's sent memo, plaintiff AUSA (dj) [Entry date 08/04/93]
8/4/93	408	Govt's notice of under seal filing of reply to dft Powell's sent memo

8/4/93	412	SENTENCING memorandum re Stacey C. Koon, Laurence M. Powell, Timothy E. Wind, Theodore J. Briseno (dj) [Entry date 08/05/93]
8/4/93	413	MINUTES: Sentencing hearing held, sentencing Stacey C. Koon (1) count(s) 2. It is the jdgmnt of the crt that the dft is h/b comm to the cust of BOP to be impris for a term of 30 mos on ct 2. Upon rel frm impris, the dft shall be plcd on supv rel for a term of 2 yrs under the fol terms and cond: 1. the dft shall comply w/the r & r of the PO and GO 318. Purs to sect 5E1.2(f) of the gudelines, all fines are wvd, incl the costs of impris and supv, as it is found that such sanc would plc an undue burden on the dft's dpts. Full rest has not been ord in view of the dft's limited assets and the fin need of dpts. It is fur ord that the dft shall pay to the U.S. a s/a of $50.00 prior to his self surr date. It is fur ord that the dft shall surr himself to the instit desig by the BOP on or befre noon, 9/27/93. In the absence of such designation, the dft shall report to the USM at 312 N. Spring, LA, CA on or before the same date and time. Ruling (s): the crt denied the dft's mot for bond pending appl. C/R: Beverly Casares by Judge John G. Davies (dj) [Entry date 08/06/93]

8/5/93	414	JUDGMENT and Committment as to dft Stacey C. Koon issued to US Marshall Judge John G. Davies. entered 8/6/93 (dj) [Entry date 8/6/93]
8/4/93	415	MINUTES: Sentencing hearing held, sentencing Laurence M. Powell (2) count(s) 1. It is the jdgmnt of the crt that the dft is h/b comm to the cust of BOP to be impris for a term of 30 mos on ct 1. Upon rel frm impris, the dft shall be plcd on supv rel for a term of 2 yrs under the fol terms and cond: 1. the dft shall comply w/the r & r of the PO and GO 318. Purs to sect 5E1.2(f) of the gudelines, all fines are wvd, incl the costs of impris and supv, as it is found that such sanc would plc an undue burden on the dft's dpts. Full rest has not been ord in view of the dft's limited assets and the fin need of dpts. It is fur ord that the dft shall pay to the U.S. a s/a of $50.00 prior to his self surr date. It is fur ord that the dft shall surr himself to the instit desig by the BOP on or befre noon, 9/27/93. In the absence of such designation, the dft shall report to the USM at 312 N. Spring, LA, CA on or before the same date and time. Ruling (s): the crt denied the dft's mot for bond pending appl. C/R: Beverly Casares by Judge John G. Davies (dj) [Entry date 08/06/93]

8/4/93	416	JUDGMENT and Committment as to dft Laurence M. Powell issued to US Marshall Judge John G. Davies. entered 8/6/93 (dj) [Entry date 8/6/93]
8/4/93	417	Dft Stacey C. Koon sent exh A (dj) [Entry date 8/6/93]
8/27/93	426	NOTICE of Cross-Appeal to 9th Circuit Court of Appeals by plaintiff USA as to defendant Stacey C. Koon [413-3] frm sentence only (18 USC 3742). Sent imposed: 30 mos impris and 2 yrs supvn rel. Bail status: Dft to surr on 9/27/93; mot for bail pend in 9th Cir. Ent in this actn on 8/6/93. (cc: all counsel) Fee Status: Bill-waived. Frms Gvn. TDO. (lj) [Entry date 08/30/93]
08/27/93	427	NOTICE of Cross-Appeal to 9th Circuit Court of Appeals by plaintiff USA as to defendant Laurence M. Powell, [415-3] frm sentence only (18 USC 3742). Sent imposed: 30 mos impris and 2 yrs supvn rel. Bail status: Dft to surr on 9/27/93; mot for bail pend in 9th Cir. Ent in this actn on 8/6/93. (cc: all counsel) Fee Status: Bill-waived. Frms Gvn. TDO. (lj) [Entry date 08/30/93]

RELEVANT DOCKET ENTRIES FROM THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

8/30/93	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL
12/10/93	Filed original and 15 copies Stacey C. Koon first brief on cross-appeal, 34 pages and excerpts of record; served on 12/9/93 [93-50608, 93-50561] (ec) [93-50561 93-50608]
12/14/93	Filed Original and 15 copies Laurence M. Powell in 93-50562, in 93-50609 first brief on cross appeal, of 35 pages and excerpts of record in 3-vols; served on 12/10/93 [93-50562, 93-50609] (ec) [93-50562, 93-50609]
1/24/94	Received original and 15 copies USA 2nd cross-appeal brief, 83 pages; exerpts of record; I & II; Transcrips of Exhibits 91 & 92 (1-vol); Presentence Report; Govt's Suppl. Sealed Excerpts of Record (1-vol); served 1/20/94 deficient: ovsz. [93-50561, 93-50562, 93-50608, 93-50609](ec) [93-50561 93-50562 93-50608 93-50609]
1/24/94	Filed USA motion to file oversized consolidated brief and late brief (promo) [93-50561, 93-50562, 93-50608, 93-50609] served on 1/20/94 [2503405] (ec) [93-50561 93-50562 93-50608 93-50609]

1/24/94	Filed USA motion to file Transcript of Exhibits 91 and 92...and suppl. Excerpts under seal (promo) [93-50561, 93-50562, 93-50608, 93-50609] served on 1/20/94 [2503405] (ec) [93-50561 93-50562 93-50608 93-50609]
2/15/94	Filed order (Joseph T. SNEED,): the Govt's motion for Leave to file oversized second brief on cross-appeal is granted; the clk shall file the oversized late second brief. The government's motion for Leave to file the transcript of Exhibits 91 and 92 is denied. The transcripts of Exhibits 91 and 92 shall be lodged for such consideration as the panel that considers the merits of the case deems appropriate. The government's motion for leave to file vol. V of the suppl. excerpts of record under seal is granted. The clk shall place vol. V of the suppl. excerpts of record under seal. The videotapes (Exhibits 91 and 92) filed with the government's suppl. excerpts of record shall be returned. The parties are referred to Rule 11-4.2. The briefing schedule set in the court's Oct 26, 1993 order continues to govern. [2503405-1] [2503411-1] in 93-50561, 93-50562, 93-50608, 93-50609 [93 50561, 93-50562, 93-50608, 93-50609 [93-50561, 93-50562, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
2/15/94	Filed original and 15 copies USA second brief on cross-appeal, 83 pages; excerpts of record 4-vols.; Presentence Report; and Vol. V suppl. excerts under seal, served on 1/20/94 [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]

2/15/94	Lodged Appellee's Transcripts of Exhibits 91 & 92 [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
3/14/94	Filed Appellant Stacey C. Koon motion for permission to file oversized brief (panel) [93-50561, 93-50562, 93-50608, 93-50609] served on 3/11/94 [2533726] [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50562 93-50608 93-93-50609]
3/17/94	Received orig. 15 copies Laurence M. Powell in 93-50562's reply brief (Informal: no) of 30 pages; served on 3/14/94 deficient brief is oversized mtn/panel. [93-50561, 93-50562, 93-50608, 93-50609] (wp) [93-50561 93-50562 93-50562 93-50608 93-93-50609]
3/17/94	Filed Appellant Laurence M. Powell's motion for leave to file an oversized reply brief. (PANEL) [93-50562, 93-50561, 93-50608, 93-50609] served on 3/14/94 [2536283] [93-50562, 93-50561, 93-50608, 93-50609] (wp) [93-50561 93-50562 93-50562 93-50608 93-93-50609]
3/30/94	Received orig. 15 copies USA reply brief. 12 pages; served on 3/28/94. (panel) [93-50561, 93-50562, 93-50608, 93-50609[(ec) [93-50561 93-50562 93-50608 93-50609]

4/5/94	Filed order (for the Court:Deputy Clerk: gb) appellant's motion for leave to file an oversized reply brief is granted. [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
4/5/94	Filed original and 15 copies Stacey C. Koon reply brief, 28 pages; served on 3/11/94 (panel) [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
4/5/94	Filed original and 15 copies Laurence M. Powell reply brief, 30 pages; served on 3/14/94 [93-50562, 93-50561, 93-50608, 93-50609] (wp) [93-50561 93-50562 93-50608 93-50609]
5/2/94	ARGUED AND SUBMITTED TO James R. BROWNING, Betty B. FLETCHER, James M. Fitzgerald [93-50561, 93-50562, 93-50608, 93-50609] (dr) [93-50561 93-50562 93-50608 93-50609]
8/19/94	FILED OPINION: AFFIRMED IN PART; VACATED IN PART AND REMANDED FOR RESENTING (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. James R. BROWNING; Betty B. FLETCHER, author; James M. Fitzgerald.) FILED AND ENTERED JUDGMENT. [93-50561, 93-50562, 93-50608, 93-50609] (ck) [93-50561 93-50562 93-50608 93-50609]

9/7/94	Filed motion and deputy clerk order (Deputy Clerk: sa) granting motion for extension of time to file petition for rehearing w/suggestion for rehearing en banc to aplts Stacey Koon and Laurence Powell to and including 9/16/94. (Motion recvd 9/2/94) [93-50561, 93-50562, 93-50608, 93-50609] (sa) [93-50561 93-50562 93-50608 93-50609]
9/14/94	[2643779] Filed original and 40 copies Appellant Stacey C. Koon petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 9/13/94 [93-50561, 93-50608] (panel; active judges) (ec) [93-50561 93-50562 93-50608 93-50609]
10/19/94	Filed order (Betty B. FLETCHER,): the US is directed to respond to the defendants' suggestions for rehearing en banc. The court is particularly interested in response to the sentencing issues. The response shall be limited to 20 pages and shall be filed on or before Nov 7, 1994. [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
11/8/94	Filed Appellee USA consolidated response to defendants' petition for enbanc rehearing, 20 pages, [2643779-1] in 93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]

1/12/95	Filed Order, Dissent and Concurrence FOR PUBLICATION (James R. BROWNING, Betty B. FLETCHER, James M. Fitzgerald,): All of the panel members have voted to deny the petitions for rehearing of both defendants. Judge Browning and Judge Fletcher have voted to reject the suggestions for rehearing en banc of both defendants and Judge Fitzgerald has so recommended. ...A judge of the court requested a vote as to whether to take the case en banc. A vote was taken. The request failed to secure the affirmative vote of a majority of the active non-recused members of the court. Judge Trott was recused. The petitions for rehearing of both defendants are denied and suggestion for rehearing en banc of both defendants are rejected. SR, cjj, dissenting, with whom HP, CEW, AK, JTN and MDH, cjj, join and with whom DFO, TGN and AK, cjj, join except as to part IV....(see order for complete text) [2643779-1] in 93-50561, 93-50608 [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
2/2/95	Filed for Publication Order And Amended Dissent And Concurrence: (James R. BROWNING, Betty B. FLETCHER, James M. Fitzgerald): The dissent from the order denying rehearing en banc filed 1/12/95 is amended as follows...(For complete text see order) [93-50561, 93-50562, 93-50608, 93-50609] (gva) [93-50561 93-50562 93-50608 93-50609]
4/17/95	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 94-1664 filed on 4/10/95. [93-50561] (ah) [93-50561]

4/19/95	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 94-8842 filed on 4/12/95. [93-50562, 93-50561] (crw) [93-50561 93-50562]
10/3/95	Received notice from Supreme Court, petition for certiorari GRANTED on 9/27/95. Supreme Court No. 94-1664 (crw) [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50608]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff. v. STACY C. KOON, LAURENCE M. POWELL TIMOTHY E. WIND, THEODORE J. BRISENO, Defendants.	CASE NO. 92-686-JGD VERDICT

We the Jury in the above-entitled cause, find the defendant

STACEY C. KOON

GUILTY as charged in Count two of the Indictment
(Guilty or Not Guilty)

DATED: April 16, 1993

AT LOS ANGELES, CALIFORNIA

483
FOREPERSON OF THE JURY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff. v. STACY C. KOON, LAURENCE M. POWELL TIMOTHY E. WIND, THEODORE J. BRISENO, Defendants.	CASE NO. 92-686-JGD VERDICT

We the Jury in the above-entitled cause, find the defendant

LAURENCE M. POWELL

GUILTY as charged in Count one of the Indictment
(Guilty or Not Guilty)

DATED: April 16, 1993

AT LOS ANGELES, CALIFORNIA

483
FOREPERSON OF THE JURY

Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

(6)

No. 94-8842

In The

Supreme Court of the United States

October Term, 1995

LAURENCE M. POWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS REGARDING THE PROPER APPROACH TO REVIEWING DEPARTURES UNDER THE UNITED STATES SENTENCING GUIDELINES, AND AFFIRM THE DISTRICT COURT'S 8 LEVEL DOWNWARD DEPARTURE BASED ON VICTIM PROVOCATION (5 LEVELS) AND A COMBINATION OF THREE NON-PROHIBITED, NON-ENUMERATED FACTORS (3 LEVELS), WHERE, AS HERE, THE FINDINGS OF FACT SUPPORTING THE DEPARTURE ARE SUPPORTED BY THE RECORD

Sub-Issues Fairly Included

1. Should the circuit court adopt and apply its own criteria for "appropriate" grounds for departure, or must it affirm any ground for departure that is neither prohibited by statute nor specifically discouraged by the United States Sentencing Guidelines themselves?

2. Is the district court in a unique position to determine that a complex of non-prohibited factors justify departure at a particular level based on how those factors fit together, converge and influence each other?

3. When the circuit court reviews the application of an "encouraged" ground for departure, should it focus on the "real offense" or "charge offense" in determining if the case is in the "heartland" as that term is used by the United States Sentencing Commission?

PARTIES TO THE PROCEEDINGS

This case is consolidated with *Koon* v. *United States*, Case Number 94-1664.

As consolidated, the parties to this proceeding are:

Laurence M. Powell, Petitioner. Mr. Powell was the Defendant in the District Court and the Appellant and Cross-Appellee in the Circuit Court.

Stacey C. Koon, Petitioner. Mr. Koon was also a Defendant in the District Court and an Appellant and Cross-Appellee in the Circuit Court.

The United States of America, Respondent. The United States was the Plaintiff in the District Court and the Cross-Appellant and Cross-Appellee in the Circuit Court.

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Should the circuit court adopt and apply its own criteria for "appropriate" grounds for departure, or must it affirm any ground for departure that is neither prohibited by statute nor specifically discouraged by the United States Sentencing Guidelines themselves? 16

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OPINIONS BELOW

The sentencing opinion of the district court is reported at 833 F.Supp. 769. 1. (Koon App. 94a-138a). The opinion of the panel of the court of appeals that reversed the sentence is reported at 34 F.3d 1416. (Koon App. 1a-79a). The order denying rehearing and the dissents of nine circuit judges from the decision to deny rehearing *en banc* as to the sentencing issue is reported at 45 F.3d 1303.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the district court was rendered on August 4, 1993. The circuit court opinion was filed on August 19, 1994. A petition for rehearing and suggestion for rehearing *en banc* was timely filed, and the order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was timely filed on January 12, 1995. A timely Petition for Writ of Certiorari was granted by this Court on September 27, 1995.

STATUTES AND REGULATIONS INVOLVED

Statutes

Title 28 U.S.C. Section 994(d):

The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider

whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance –

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional conditions to the extent that such conditions mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders.

Title 18 U.S.C. Section 3553(b):

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless

the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

Title 18 U.S.C. Section 3553(a)(4)(A):

The court, in determining the particular sentence to be imposed, shall consider –

(4) the kinds of sentence and the sentencing range for –

> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28 United States Code, and that are in effect on the date the defendant is sentenced;

Title 18 United States Code, Section 3553(a)(2)

The court, in determining the particular sentence to be imposed, shall consider –

(2) the need for the sentence imposed –

(A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

Title 18 United States Code, Section 3661:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Provisions of the United States Sentencing Guidelines Manual

Chapter 1, Part A, (Introduction), Section 4 (Policy Statement)

Subsections (a) *Real Offense vs. Charge Offense Sentencing* and (b) *Departures* are excerpted at length in the test of the brief that follows.

U.S.S.G. § 2A2.2(a)	Aggravated Assault
U.S.S.G. § 2A2.2(a)(3)	Bodily Injury (from aggravated assault)
U.S.S.G. § 2A2.2(b)(2)(B)	Upward Adjustment for Use of A Dangerous Weapon (Baton)
U.S.S.G. § 2H1.4	Base Offense Level for Violations of Title 18 U.S.C. § 242.
U.S.S.G. § 5H1.1 p.s.	Age (Policy Statement)
U.S.S.G. § 5H1.4 p.s.	Physical Condition (Policy Statement)
U.S.S.G. § 5K2.0 p.s.	Grounds for Departure (Policy Statement)
U.S.S.G. § 5K2.10 p.s.	Victim's Conduct (Policy Statement)

STATEMENT OF THE CASE

Petitioner was charged in Count One of a Two Count Indictment returned on August 4, 1992 with violating Section 242 of Title 18 of the United States Code, in that he "willfully used unreasonable force during the arrest of Rodney Glen King." (J.A. 1).

After a jury trial he was convicted by a general verdict of guilty on Count 1 of the Indictment on April 17, 1993. (J.A. 14).

On August 4, 1993 the district court sentenced petitioner. The court fixed the applicable guideline range at level 27 [70-87 months], and departed downward to level 19 [30-37 months]. The district court selected the low end of the sentencing range and sentenced petitioner to 30

months imprisonment, followed by two years of supervised release, and waived all fines and costs. (J.A. 23).[1]

Thereafter Petitioner appealed the conviction and the government filed a cross-appeal from the sentence to the Ninth Circuit Court of Appeals. The appeals were consolidated with the identical appeal and cross-appeal in the case of petitioner's trial co-defendant, Stacey C. Koon. (J.A. 6).

The Circuit court filed its opinion affirming the convictions of Petitioner (and Koon), and vacating the sentence (for both Petitioner and Koon) and ordering the case remanded to the district court for resentencing. (J.A. 10).

Petitioners then sought rehearing and rehearing *en banc* which the circuit court denied without opinion. Nine judges of the circuit court dissented from the order denying rehearing *en banc* limited to the question that is now before this Court, the propriety of the sentence. (J.A. 11).

On motion of petitioner, the circuit court stayed the mandate pursuant to Federal Rules of Appellate Procedure, Rule 41(b) pending this Court's ruling on his petition for writ of certiorari. On September 27, 1995 this Court granted the petition for writ of certiorari, limited to issue 4 relating to the sentence.

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[1] Although references are to the Joint Appendix, all of these procedural facts are recorded in the published sentencing decision of the District Court, reported at *United States* v. *Koon*, 833 F.Supp. 769 (D.C. Cal. 1993).

SUMMARY OF ARGUMENT

Petitioner urges this Court to establish the proper approach on appeal for reviewing a district court decision to depart from the applicable guideline range. In this case the district court departed downward 8 levels, from level 27 to level 19 and imposed a sentence of 30 months. It departed 5 levels down on the basis of its finding that victim provocation, an "encouraged" ground for downward departure,[2] was present and 3 additional levels on the basis of a combination of three factors that are neither "encouraged" nor prohibited. On appeal to the Ninth Circuit Court of Appeals the sentence was reversed. The circuit court held none of the three factors applied in combination was an "appropriate" basis for departure either alone or in combination with one another, and further held that the district court incorrectly applied the victim provocation guideline encouraging departure to the facts of this case.

The circuit court examined in detail the district court's reasoning and, in effect, substituted its judgment for that of the district court on the question whether the three "combination factors" were "appropriate" grounds for downward departure, in violation of Title 18 U.S.C. § 3553(b) which limits the court in determining if a particular factor is a proper basis for departure to a consideration of only the "sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

Petitioner urges this Court to conclude that the three factors, in combination at least, constitute reasons, when

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[2] Pursuant to U.S.S.G. § 5K2.10.

considered together, that justify a district court's departure. Those factors are "additional punishment" these defendants would likely suffer as the result of unique factors present here but absent in the typical case, an absolute lack of any danger posed to the community by the defendant, and the unfairness of the successive prosecution of the defendants by the federal government after acquittals in state court for the identical conduct.[3] Adopting the proper role of the reviewing court, consistent with the dictates of Congress,[4] the approach of the Guidelines themselves,[5] and the prior decisions of this Court,[6] this Court is urged to find that in this case the reasons are appropriate bases to depart or, at least conclude the three level departure is "reasonable" under the rationale of *Williams* v. *United States, supra.*[7]

In addition, the district court properly invoked victim provocation, which is a ground for departure that is specifically articulated in the Guidelines, in U.S.S.G. § 2K2.10. Contrary to the holding of the circuit court, and the argument of the government, the district court did not find that the offense conduct was *not* provoked by the

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[3] Although for a violation of different penal statute.

[4] 18 U.S.C. § 3553(b).

[5] Chapter 1, Part A, Section 4, Subsection (b), United States Sentencing Guidelines Manual; U.S.S.G. § 5K2.0 p.s.

[6] *Williams* v. *United States*, 503 U.S. ___, ___, 117 L.Ed.2d 341, 112 S.Ct. 1112.

[7] "A sentence thus can be 'reasonable' even if some of the reasons given by the district court to justify the departure from the presumptive Guideline range are invalid." 503 U.S. ___, ___, 117 L.Ed.2d, at 355.

victim's improper conduct, but only that it was not contemporaneous with it. Both the government (below) and the circuit court engage in elaborate reasoning to support the conclusion that *because* this is a police misconduct case, departure for victim provocation should not have been permitted, *despite* the district court's factual findings that the victim here posed a real and reasonably perceived threat of serious physical harm or death to petitioner Powell, personally, and despite the fact he rose to his feet and charged in petitioner Powell's direction after he was ordered under arrest, and to remain still by a host of armed police officers, and despite the circuit court's acknowledgement that this provocative conduct and the offense conduct all occurred within a matter of seconds.

Finally, this Court is urged to conclude that when a district court is considering what constitutes the "heartland" of an offense[8] for the purpose of determining

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[8] The term "heartland" is not found in the governing statutes, nor is it discussed in Chapter 5 of the United States Sentencing Manual which deal specifically with departures. Rather it is found solely in the Introduction, Chapter 1, Part A, Section 4, subsection (b), *Departures*. There, in the first paragraph, it is said:

> "The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." Excerpt, first ¶, U.S.S.G. § 1A4(b) p.s.

It may also be observed that despite numerous holdings in the circuit courts to the contrary this is clearly not intended as

whether and to what extent departure is warranted in any particular case, the basic approach of the Guidelines

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an *exclusive* rationale for departure. In other words, even a cursory examination of the various grounds encouraged or suggested by the Commission itself for departures establishes that departures are not limited to cases that are, to any reasonable appearance, "atypical." Consider, e.g., departures for "substantial cooperation" which must be viewed as at least a commonplace if not outright typical occurrence. None of the offender based departures encouraged or (at least) permitted, (e.g., age related (5H1.1) or physical impairment related (5H1.4)) by the Guidelines themselves take the case out of the "heartland."

Nor, in the final analysis, do all of the approved (or non-prohibited) offense conduct grounds for departure take the cases out of the "heartland" unless the court adopts a tautological definition for "heartland" according to which anything that permits departure is, *ipso facto*, outside the heartland. This type of definition would be required, e.g., to fit departure for the use or possession of a dangerous weapon under U.S.S.G. § 5K2.6 which specifically encourages substantial upward departure when a firearm is discharged and not otherwise taken into account by the applicable Guidelines. The mere fact that the Guidelines do not take a factor into account, or do not do so to the degree it is present in a given case is not logically or legally equivalent to the fact that the offense conduct is atypical.

In fact, the Commission itself has recognized that its Guidelines are a work in progress, and that as time goes by, the Guidelines will be amended to better reflect what factors take a case outside of the "heartland" and to incorporate reasons courts use to depart where they are recurring. See U.S.S.G. § 1A4(b), 2d ¶ p.s., wherein the Commission candidly concedes "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.

From this it might well be concluded that a departure can be valid *either* where the factor makes the case atypical (the "heartland" analysis); *or* where the basis for departure is specifically encouraged in the Guidelines themselves, e.g., for substantial

requires the court to look at the offense conduct or what the commentary to the Guidelines calls the "real offense" rather than the "charge offense."

Here, looking at the offense conduct, [aggravated assault] (which, after all, *is the consistent focus of the Guidelines*), makes the victim misconduct departure ground obviously appropriate, whereas looking at the "charge offense" [deprivation of civil rights] merely clouds the departure issue.

ARGUMENT

This court should resolve the conflict in the circuits regarding the proper approach to reviewing departures under the United States Sentencing Guidelines, (hereafter "Guidelines") and affirm the district court's 8 level downward departure based on victim provocation (5 levels) and a combination of three non-prohibited, non-enumerated factors (3 levels), where, as here, the findings of fact supporting the departure are supported by the record.

The two issues that are specific to this case are set out in the footnote 2 to the first sentence in Issue 4 in the Petition for Writ of Certiorari. They are:

1) Is departure justified where, as here, it is based on a "complex" or combination of non-prohibited factors, or may the circuit court subject such grounds for departure to

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cooperation or victim provocation, *or* where the district court identifies a factor that is present that is "potentially relevant to a sentencing decision" that the Commission simply did not address.

an "appropriateness" test, not found in the Guidelines?

2) Is a departure for "victim provocation" lawful where, as here, the "offense conduct" is aggravated assault, even though (a) the "crime offense" is wilful deprivation of civil rights, and (b) the provocative misconduct of the victim precedes the offense conduct by a matter of seconds but is not contemporaneous with it?

Petitioner contends the answer to both questions is "yes" and that the district court lawfully based a 3-level downward departure on a unique combination of factors, which, may or may not have justified departure if viewed alone or abstractly, which is how the circuit court viewed them.

Inherent in these questions[9] are three more fundamental questions regarding the depth of oversight circuit courts should exercise when considering a district court's decision to depart.

First: This Court must decide if the circuit courts should develop their own body of departure law establishing fact-based categories of factors upon which departures (upward or downward) will be permitted in a particular circuit, or should the circuit court merely inquire whether the particular ground, or grounds employed by the district court are either explicitly prohibited by the Guidelines, or otherwise precluded by treatment (or adequate treatment) in the Guidelines calculation of the base offense level and adjustments up and

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[9] And thus "fairly included" in them. Supreme Court Rules, Rule 14.1(a).

down to it for relevant conduct, other offense conduct, and offender characteristics.

If this court concludes the circuit's inquiry should be limited to this latter process, it will also compel the conclusion that some or all of the three combined grounds[10] employed by the district court here to depart three levels downward are neither explicitly prohibited, nor otherwise treated (or adequately) treated by the Guidelines.

Second: The district court retains a unique vantage point for evaluating the way factors in a particular case converge and influence one another to form a basis for departure that may not be readily apparent to a reviewing court, or, indeed to another without that unique point of view.

Here, while an abstract analysis of the three "combination factors" used by the district court persuaded the three-judge panel below that none were an appropriate ground for departure, so no combination of them could

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[10] The district court rendered a sentencing decision reported at 833 F.Supp. 769. It identified these three factors, considered together, at pp. 779-780 of Petitioner's Excerpt of Record filed in the circuit court. (References to *this* Petitioner's Excerpt of Record are in the form "(POW. E.R. 12)." The district judge wrote:

> "Koon and Powell have already sustained, and will continue to incur, punishment in addition to the sentence imposed by this court. * * * "Koon and Powell are [not] dangerous or likely to commit crimes in the future, and * * * the successive state and federal prosecutions raise the specter of unfairness." (POW. E.R. 779-780).

justify the three-level departure granted, nine dissenters concluded that:

> "The panel at no point considered the interplay of the various factors that Judge Davies considered. Instead it assessed each of the factors independently and concluded in each instance that it would be inconsistent with the Guidelines to depart downward on the basis of the isolated factor – notwithstanding the fact that none of them was a *prohibited* factor. The panel then rejected the combination of factors on the basis that each one constituted an inappropriate basis for departure. No combination departure could survive this divide and conquer method of review." (*United States* v. *Koon*, 45 F.3d 1303, 1305 (9th Cir. 1995)).

If this court adopts the view that only prohibited factors are invalid reasons for departure, and further accepts the unique role of the sentencing judge in determining the appropriate interplay of such factors when identified as a ground for departure, the three-level departure in this case should be upheld.

Third: The district court also departed five levels downward on the basis of an "encouraged" ground for departure, victim provocation, under U.S.S.G. § 5K2.10, which provides that a departure may be warranted whenever the district court finds the wrongful conduct of the victim "contributed significantly to provoking the offense behavior." The circuit court condemned departure on this ground, despite the district court's carefully documented factual findings that the victim's "wrongdoing precipitated the initial use of force, and thereby substantially

contributed to the offense conduct."[11] The "wrongdoing" found by the district court included the victim's "attempt to escape from police custody" at a time the district court found the officers had not yet used illegal force, and the fact that the victim, an unsearched felony suspect "ran in the direction of Mr. Powell"[12] after he was ordered to get down and remain still.

While at first blush this may appear to be a fact-bound question not worthy of this court's resources,[13] the panel below rejected this basis for departure as an incorrect application of the guidelines for two reasons: (1) the provocative conduct found by the district court was not *contemporaneous* with the assaultive offense conduct; and (2) victim misconduct does not take the case out of the "heartland" of the crime offense – wilful violation of civil rights.

The first rationale for rejecting provocative victim misconduct in this case is remarkable because it is totally unsupported by any authority, or even a fair reading of the Guideline policy statement that encourages a district court to consider downward departure under the circumstances of this case, especially where, as here, the offense conduct followed the wrongful, provocative, conduct of the victim by "only a matter of seconds," as the district court found and the opinion of the panel below concedes.[14]

The second rationale presents a serious policy question – should the "heartland" analysis discussed in the

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[11] POW. E.R. 783.

[12] POW. E.R., 781.

[13] As apparently argued by the United States.

[14] *United States* v. *Koon, supra,* 34 F.3d, at 1458, quoting from *Koon,* 833 F.Supp., at 787.

Guidelines policy statement[15] focus on the "offense conduct" or the "crime offense"?

Petitioner maintains that the circuit court makes a category mistake when it concludes the heartland of criminal civil rights cases (the "crime offense") must be assessed here, rather than the heartland of aggravated assault (the "offense conduct").

If this court concludes the only focus for a "heartland" analysis consistent with the general approach and method of the Guidelines is the "offense conduct," that conclusion will dictate affirmance of the district court's use of victim provocation under U.S.S.G. § 2K2.10 as a valid ground for departure in this present case.

Consideration of the proper role of deference by a reviewing court to the district court's determination of the weight to give a valid ground for departure and the extent to depart, will also compel the conclusion that the degree of departure in the present case was "reasonable"[16] and therefore not an abuse of discretion.

Sub-Issue One

Should the circuit court adopt and apply its own criteria for "appropriate" grounds for departure, or must it affirm any ground for departure that is neither prohibited by statute nor specifically discouraged by the United States Sentencing Guidelines themselves?

In *Williams* v. *United States*, 503 U.S. ___, 117 L.Ed.2d 341, 112 S.Ct. 1112 (1992) this Court considered whether

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[15] Chapter 1, Part A, Ch. 4(b).

[16] See *Williams* v. *United States*, 503 U.S. ___, 112 S.Ct. 1112.

to affirm a sentence where the district court departed in part on valid and in part on invalid factors. Indeed the *Williams* decision provides the most guidance to date regarding, and insight into, the proper analysis of a departure issue under the Guidelines.

Justice O'Connor, writing for the majority,[17] stated that the decision "consider[ed] the scope of appellate review, under the Sentence Reform Act of 1984, of a sentence in which a district court has departed from the guideline sentence." *Williams* v. *United States*, 503 U.S. ___, ___, 117 L.Ed.2d, at 350. The Court held that a district court's use of an invalid departure ground is an appealable "incorrect application of the guidelines" under 18 U.S.C. § 3742(f)(1). *Williams* v. *United States*, 503 U.S., at ___, 117 L.Ed.2d 352.

> "Construing the plain language of the Guidelines Manual and the governing statute, we conclude that it is an incorrect application of the Guidelines for a district court to depart from the applicable sentencing range based on a factor that the Commission has already fully considered in establishing the guideline range, or as in this case, on a factor that the Commission has expressly rejected as an appropriate ground." *Williams* v. *United States*, 503 U.S., at ___, 117 L.Ed.2d 353.

Williams, then, established the appropriate role of the reviewing court in an appeal from a District Court departure above or below the guidelines sentence – when the District Court incorrectly applies the Guidelines and

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[17] Justice White dissented and Justice Kennedy joined in dissent.

bases a departure on a factor "the Commission has already fully considered" or "on a factor the Commission has expressly rejected as an appropriate ground."

In the present case, however, the circuit court went far beyond this role in finding the district court erred in basing a three-level downward departure on the combination of three factors. Rather than limiting its inquiry into whether those three factors were either "already fully considered" by the Commission, or "expressly rejected as an appropriate ground" the circuit court here applied its own "appropriateness" test to the three factors and found each of them wanting. The three factors identified by the district court are (1) "additional punishment" appellants would receive on account of their unusual susceptibility to prison abuse and the administrative LAPD proceedings to which they would be subjected; (2) the extreme absence of a need to protect the public from future wrongdoing; (3) the unfairness of the successive state and federal prosecutions for the same conduct.[18]

The panel below claimed to approve of the concept of using three factors in combination to depart, even when any one individually would not justify a departure, but then proceeded to determine that since none of the individual factors was an appropriate basis for departing, the combination of the three could not be, either.

Regarding the first, "additional punishment" factor, the circuit court panel held, "all these consequences could

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[18] This is the circuit court's characterization of the three reasons the district court used, in combination, to justify three levels of downward departure. *United States* v. *Koon*, *supra*, 34 F.3d, at 1452.

be considered 'additional punishment' that flow from conviction, yet seldom can one conceive of a situation in which these consequences form an appropriate basis for granting a departure."

But in reaching this conclusion the Court did not examine or attempt to apply the commentary that the Commission itself gives the courts regarding a district court's departure decisions.

In PART H of Chapter 5 of the Guidelines, for example, the commission explained that it had considered and determined whether certain offender characteristics were "ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." The factors listed in Chapter 5H do *not* include factors the circuit court determines to be "inappropriate." Similarly, Section 2 of PART K of Chapter 5 of the Guidelines deals specifically with "other grounds for departure." That section lists categories of potential departure and expresses the Commission's view on their use to depart up or down. The policy statement contained in § 5K2.0 is instructive.

> "Circumstances that may warrant departure from the guidelines pursuant to this provision[19] cannot by their nature be comprehensively listed and analyzed in advance. * * * Any case may involve factors in addition to those identified

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[19] Title 18 U.S.C. § 3553(b), allowing departure if the district court finds "that there exists an aggravating or mitigating circumstances of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

> that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, *in the discretion of the sentencing court.*" [Excerpt, U.S.S.G. § 5K2.0, p.s. Italics supplied.]

To be sure, "additional punishment" is not listed in the list of prohibited grounds for departure that follows. Nor is it prohibited anywhere by the Commission. The Court relied on the following passage from *United States* v. *Anders*, 956 F.2d 907, 914, *cert. denied*, 113 S.Ct. 1592 (1993):

> "The factors that go into a complex must be those at least authorized, and certainly not expressly prohibited, by the Sentencing Guidelines." *Anders*, 956 F.2d, at 914.

But the Commission explicitly stated that permitted departures fall into *two* categories, those mentioned and guided, and those not mentioned and not guided.

> "It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to § 2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. * * *
>
> "A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on

> grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside the suggested level is warranted. * * * ." U.S.S.G., Chapter 1, Pt. A., 4.(b) [Policy Statement, *excerpt*, 5th and 6th ¶'s.].

Clearly, district courts are not limited to factors "authorized" by the Guidelines.[20]

The circuit court also relied on a passage from a prior opinion of the Ninth Circuit, *United States* v. *Crippen*, 961 F.2d 882, 884 (9th Cir.), *cert. denied*, 113 S.Ct. 438 (1992) where the court listed "factors relevant to sentencing" as including the nature and seriousness of the offense, deterrence of criminal conduct, protection of the public from further crimes by the defendant, correctional treatment of the defendant, the history and characteristics of the defendant, the need to avoid unwarranted sentencing disparities, promotion of respect for the law, and the provision of just punishment. *Koon*, 34 F.3d, at 1453.

The last phrase "provision of just punishment" alone demonstrates the misuse of this litany by the panel below,

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[20] And see U.S.S.G., Chapter 1, Pt. A., 4.(b) [Policy Statement, *Departures, excerpt*, 1st ¶], which states, after listing certain factors explicitly approved for departure.

> "With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."

which was actually taken from a list of goals of the guidelines,[21] and not from a list of criteria to be employed when reviewing departure factors for relevance to sentencing.

It is interesting to note that the authority cited by the circuit court, besides its own prior decisions, is two statutes, 28 U.S.C. § 994(d), and 18 U.S.C. § 3661. But neither of those statutes justify the conclusion reached below, that departures on non-discouraged grounds are "inappropriate" unless they are authorized by Congress.[22]

Section 994(d) specifies that the ". . . Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d).

Title 18 U.S.C. § 3661 provides:

> "No limitation shall be placed on the information concerning the background, character,

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[21] Title 18 U.S.C. § 3553(a).

[22] As the Eleventh Circuit noted in *United States* v. *Mogel*, 956 F.2d 1555 (11th Cir. 1992):

> "In sum, section 994 correlates the penological goals of retribution and general deterrence with the offense-based, or vertical, component of a sentence, and the goals of incapacitation and rehabilitation with the offender-based, or horizontal, component. The Guidelines reflect this basic framework by identifying specific circumstances that affect the offense- and offender-related components of a sentence. * * *
>
> "Finally, and for the present case most significantly, the Guidelines comment on the availability of offender-related characteristics other than criminal history as grounds for departure. See U.S.S.G. Ch. 5, Pt. H." *United States* v. *Mogel, supra*, 956 F.2d, at 1561.

> and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

From these two statutes, the panel below seems to have drawn the inference that Congress established a concrete limitation on the categories of grounds a sentencing judge could rely on in departing downward. Petitioner views these sections as merely prohibiting constitutionally inappropriate bases for any sentencing decision, such as would violate the most fundamental principles of equal treatment under the law[23] and as ensuring that the district court is free, despite the mandatory aspect of the Guidelines, to consider any other factor that is either mitigating or aggravating as a basis for potential departure.

The court below stated that "departures should reflect the defendant's culpability and seriousness of the crime," paraphrasing from the same prior decision.[24] But if that is so, it is the length of sentence that should *reflect* these things, not the bases of the departure. An explicit passage from the Guidelines themselves is instructive in this regard. The "age" policy statement states in pertinent part:

> "Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally *efficient* as and less costly than

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[23] Such as using the defendant's race, sex, or religion as a basis for giving a different sentence.

[24] *Koon*, 34 F.3d, at 1453.

> incarceration." U.S.S.G. § 5H1.1 p.s., excerpt. Italics supplied.

Clearly, the defendant's age or infirmity relates to neither the "defendant's culpability" nor the "seriousness of the crime" and can be said to "reflect" neither. Still, the Commission itself indicated that in some instances age and age-related infirmity may be a basis for a downward departure.

Similarly, the Commission explicitly sanctioned downward departure where the defendant is particularly vulnerable in prison due to physical condition.

> "Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." U.S.S.G. § 5H1.1 p.s., excerpt.

In the present case the vulnerability of Petitioner in prison, and the likelihood that his prison time would be more difficult or dangerous than the vast majority of other defendants relates not to his *physical* strength or ability, but to his appearance. He is an internationally infamous person as the result of the world-wide publicity this case has received.[25] The district judge was sensitive

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[25] In a discussion that cannot have any relevance whatever to the departure question, the panel below focused on the fact that it was Petitioner's own criminal act that brought this negative publicity to him, and concluded he should, therefore, not

to the fact that as a result of that negative publicity[26] there would be a wide range of prison inmates that would recognize Petitioner as a former police officer (which reasonably makes a prison stay more dangerous for the former officer), and many more, including inmates and guards who would recognize him as the officer that was depicted beating Rodney King on a video tape that saturated the local and national press, and condemn him for the conduct shown on the video tape. The district court in this case cannot be said to have acted unreasonably when it determined that this disability Petitioner would suffer in prison was "extraordinary" when this offender is compared to others.

As noted above, there is another problem with the circuit court invoking its own view of what constitutes an "appropriate" ground for departure. That approach violates the Congressional mandate contained in Title 18 U.S.C. § 3553(b) which limits the court in determining if a particular factor is a proper basis for departure to a consideration of only the "sentencing guidelines, policy

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profit from it in the form of a lower sentence. But, of course, in *every* case, the defendant's criminal conduct is the reason he and potential bases for departure are before the court. By analogy, if a person with an "extraordinary physical impairment" that would justify a downward departure under Section 5H1.4 were the result of an injury sustained in the course of the commission of the crime for which the defendant were being sentenced, that would not change the thrust of the policy statement.

[26] Which the prosecutor mentioned in his argument to the jury, in his "Paris to Tokyo" remark, and which the President of the United States contributed to when he (President Bush) declared the Simi Valley "not guilty" verdicts unjust and promised "justice in federal court" while the streets of Los Angeles burned in the riots that followed the state court acquittals.

statements, and official commentary of the Sentencing Commission."

By claiming to look to statutes and other sources, the circuit court failed to appreciate the main thrust of Section 3553(b) and this court's statement in *Williams, supra,* to the effect that grounds for departure need only be not explicitly prohibited, or not adequately or exhaustively considered and accounted for in the Guidelines themselves.

Applying this standard to the "additional punishment" factor identified by the district court, it is clear the concern was not for a "class" of defendants (police officers) as intimated by the circuit court,[27] but for a unique factor here – the impact world-wide negative publicity would likely have on these particular defendants once they were relegated to a federal prison population. Viewed in this context, guided by the mandate of Section 3553(b), it is clear using this factor was not an incorrect application of the guidelines subject to *de novo* review and reversal.

Similarly, the district court's consideration of its third factor, the "specter of unfairness" these particular defendant's had suffered by virtue of the successive state and federal prosecution, was flawed. The circuit court found that it was not "appropriate" to use this factor, primarily because the successive prosecution was not unconstitutional and it raised no "legitimate sentencing concern".[28]

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[27] The circuit court said this ground of departure was made on the basis of the defendant's membership in the class of police officers. *Koon,* 34 F.3d, at 1454.

[28] *Koon,* 34 F.3d, at 1457. Again, citing *United States* v. *Crippen, supra,* 961 F.2d at 884.

Petitioner contends the government's charging decision is a factor the Guidelines neither adequately account for, nor specifically prohibit, and it must be acknowledged, presents a unique factor in the historical context of this particular case.

In fact, despite its *legality* there is something seriously unsettling about prosecuting a defendant for the identical conduct for which he has already been tried and acquitted. In the present case, that reaction to the federal re-prosecution of these defendants was underscored by the widespread publicity the state trial received, and by the general perception that the state prosecution was conducted in earnest in front of a fairly chosen jury by a dedicated prosecutor who vigorously sought conviction in the courtroom of a widely respected state judge.[29] Indeed, the apparent motivation for the federal prosecution was the *reaction* of the Los Angeles, and the larger community to the state verdicts, and that potentially political motivation does, undeniably, carry with it a specter of unfairness.

Moreover, the import of the district judge's discussion of this sub-factor appears to be the impact that suffering through two widely publicized criminal prosecutions had and would continue to have on the defendants themselves.[30]

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[29] This case carried none of the hallmarks of the post-reconstruction trials of white racists in the south in which white juries acquitted white defendants for crimes committed against black victims with the apparent approval of the (white) state prosecutors, (white) state court judges and (white) state juries.

[30] POW. E.R. 791.

This type of ground for departure is not prohibited by the Guidelines, nor is it accounted for in any of its provisions of policy statements or commentary.

To the extent the Guidelines *do* discuss this type of a factor for departure, they appear to approve of the principle involved. In Chapter 1, Part A, § 4(a) [4th ¶] p.s. the Commission explicitly approves the "use of its departure power" to "control inappropriate manipulation of the indictment." Of course it is clear beyond cavil that the government retains unfettered and unreviewable discretion to make whatever charging decisions it chooses, free from judicial restraint or interference. Nevertheless, it also appears to be clear, from the policy statement quoted, that when a district judge believes the government use of that discretion, while constitutional and legal, contains an element of unfairness, the Commission envisioned that as a proper basis to depart.

Additionally, the point is underscored by the Commissions re-visiting it in its policy statement on *Multi-Count Convictions*.

> "The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the *sentencing court will have adequate power to prevent such a result through departures.*" U.S.S.G., Chapter 1, Part A, Section 4(e). [Italics supplied.]

While it is not contended here that the government did precisely this – unfairly overcharge by multiplying a single count, the district court perceived an element of unfairness in the government charging decision to multiply the prosecutions of the offense conduct herein by

successive federal and state trials after an acquittal in state court. That perception of unfairness in the lawful exercise of the government's charging discretion as the type of ground a district court could use to depart appears to have been both anticipated and approved by the Commission in principle. Certainly, it was not explicitly prohibited.

The circuit court's conclusion this "specter of unfairness" sub-basis for the three-level departure was "inappropriate," should be rejected because this ground for departure is neither prohibited, nor adequately accounted for in the Guidelines, commentary and policy statements, and, to the extent those sources have anything to say, they appear to approve of this type of departure.

Finally, although it may be conceded that the defendant's dangerousness to the community is ordinarily adequately accounted for in the criminal history calculation, this fact was tacitly acknowledged by the district court when it stated the three factors were not, individually, a valid basis for departure, but when considered in combination, they are.[31]

This "combination" analysis is discussed below.

Sub-Issue Two

Is the district court in a unique position to determine that a complex of non-prohibited factors justify departure at a particular level based on how those factors fit together, converge and influence each other?

Former Chief Justice Berger traced the history of federal criminal sentencing in the United States in his

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[31] POW. E.R. at 780:7-9.

opinion in *United States v. Grayson*, 438 U.S. 41, 45-52, 57 L.Ed.2d 582, 586-591, 98 S.Ct. 2610 (1978).[32] His discussion of the rehabilitative model as it contrasts to the retributive and determinate sentence models in some ways foreshadowed the philosophical underpinnings of the modern Sentencing Guidelines, promulgated by the Commission.[33] While *Grayson* affirmed the power of the district court to consider and increase punishment on the basis of a factor that seemed relevant to the appropriate sentence, disparity and dishonesty that resulted from virtually uncontrolled trial court discretion in sentencing and parole commission discretion in release dates led to widespread criticism of the federal sentencing law.

> "Under fire for the ineffectiveness of the federal criminal justice system, Congress set out in 1984 to revamp the federal sentencing scheme. To accomplish this, Congress designated the United States Sentencing Commission ("Commission") as the guiding force in the fight against crime. To execute the task, Congress directed the Commission to establish sentencing guidelines that all federal judges would use in sentencing offenders, in the hope of creating a system in which similar offenses would receive similar punishment. However, questions eventually arose regarding the constitutionality of this new scheme, forcing the Supreme Court to

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[32] Holding a sentencing judge may consider the belief that the defendant lied under oath during the trial as a factor to increase the sentence.

[33] See generally, Guidelines, Chap. 1, Pt. A, § 3, *The Basic Approach* (Policy Statement).

resolve the constitutional legitimacy of the Commission and its function."[34]

In *Mistretta v. United States*, 488 U.S. 361, 102 L.Ed.2d 714, 109 S.Ct. 647 Justice Blackmun[35] noted the historical discretion the sentencing judges enjoyed under a century of indeterminate sentencing in federal cases. (488 U.S. at 363, 102 L.Ed.2d at 725). The nature of the sentencing law, "led almost inevitably to the conclusion on the part of the reviewing court that the sentencing judge 'see more and senses more' than the appellate court; thus, the judge enjoyed the 'superiority of his nether position' for that court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal." (488 U.S. at 364, 102 L.Ed.2d at 725).

But Justice Blackmun also noted that "[h]istorically . . . the scope of judicial discretion with respect to a sentence is subject to congressional control. Ex Parte United States, 242 U.S. 27, 61 L.Ed. 129, 37 S.Ct. 72 (1916)" (488 U.S. at 364, 102 L.Ed.2d at pp. 725-726).

Because the indeterminate sentencing model, with its concomitant broad discretion for the sentencing judge and parole authority, resulted in "serious disparities in sentences" and its philosophical underpinning, the probability of rehabilitation of most prisoners, came under attack, Congress took two measures designed to remedy the situation.

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[34] Newton, Todd L., *Note, Criminal Procedure – Commentary that binds: The increased power of the United States Sentencing Commission in light of Stinson v. United States, 113 S.CT. 1913 (1993)*, 17 U. Ark. Little Rock L.J. 155.

[35] Writing for eight members of this Court, Justice Scalia alone dissented.

First, it passed the Parole Commission and Reorganization Act in 1976[36] and later passed the Sentence Reform Act of 1984 (hereafter, "SRA"). Ironically, the recognized purpose of the Parole Commission and Reorganization Act was "to moderate the disparities in the sentencing practices of individual *judges*." [Italics supplied.] *United States v. Addonizio*, 442 U.S. 178, 189, 60 L.Ed.2d 805, 99 S.Ct. 2235.

Unquestionably, the twofold purpose of the SRA was to address and ameliorate the "great variation among sentences imposed by different judges upon similarly situated offenders" and to remedy the "uncertainty as to the time the offender would [actually] spend in prison" under a given sentence. *Mistretta v. United States*, 488 U.S., at 366, 102 L.Ed.2d, at 727, 109 S.Ct. 647.

In describing the SRA, Justice Blackmun looked to the Senate Report on the 1984 Legislation, S. Rep. No. 98-225 (1983), and concluded that the system is a "mandatory guideline system." However, Congress "rejected strict determinate sentencing because it concluded that a guideline system would be successful in *reducing* sentence disparities *while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case*. Id. Senate Report, at 78-79, 62." [Italics supplied.] (*Mistretta v. United States*, 488 U.S., at 367, 102 L.Ed., at 727, 109 S.Ct. 647).

The SRA did the following specific things: (1) rejected the rehabilitation model of imprisonment; (2) abolished the U.S. Parole Commission and established the United States Sentencing Commission, and directed the

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[36] 18 U.S.C. §§ 4201-4218.

later to devise guidelines to be used for sentencing; (3) makes all sentences "basically determinate"; (4) makes the Sentencing Commission's guidelines "binding on the courts, although it preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines." 18 U.S.C. §§ 3553(a)(b); (5) it authorized limited appeals, permitting the defendant to appeal a sentence that is above the defined range, the Government to appeal a sentence that is below, and either side to appeal an incorrect application of the guidelines. *Mistretta v. United States*, 488 U.S. at 367-368, 102 L.Ed.2d at 727-728, 109 S.Ct. 647.

It is clear that the SRA did *not* remove all discretion from the sentencing judge. Rather, it merely limited and guided that discretion, as is the traditional role of congress.

But, to the extent that the SRA has retained the flexibility that Justice Blackmun discussed in *Mistretta, supra*, the traditional role and vantage point of the district judge remains important.

The circuits are virtually unanimous in recognizing that the district courts continue to occupy a unique position with regard to the presence and significance of mitigating and aggravating sentencing factors, whether used by the Guidelines as upward or downward adjustments, or used by the district court itself as grounds for departure.[37]

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[37] See e.g., *United States v. Rivera*, 994 F.2d 942, 951-952 (1st Cir. 1993); *United States v. Colon*, 884 F.2d 1550, 1556 (2d Cir.

In the most forceful statement of the point, (then) Chief Judge BREYER observed in *United States v. Rivera*, 994 F.2d 942, 951-952 (1st Cir. 1993):

> "[T]he district court's decision that circumstances are of a 'kind,' or 'degree,' that warrant departure will *not* involve a 'quintessentially legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent. A district court may well have a special competence in making this kind of determination, because it may have a better 'feel' for

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1989) ["Moreover, we have no doubt that the standard for review of departures will evolve over time in a way that requires a showing either of a clear error of law or an abuse of discretion."]; *United States v. Rios*, 893 F.2d 479, 481 (2d Cir. 1990); *United States v. White*, 875 F.2d 427, 431 (4th Cir. 1989) ["A sentencing judge is in "a unique position to carefully examine the particular circumstances of each case"]; *United States v. Nelson*, 918 F.2d 1268, 1273 (6th Cir. 1990) ["But it is precisely the "unusual" case for which departure authority exists. The district courts enjoy a unique role in applying the guidelines. They are responsible for fitting flesh and blood defendants within a theoretical framework that attempts to quantify attitude, behavior, culpability, and a myriad of subjective characteristics objectively. Because that task is so specialized, we think reviewing courts are obliged to give considerable deference to district courts' decisions to depart from the sentence guidelines . . . "]; *United States v. Yanez*, 985 F.2d 371, 374 (7th Cir. 1993); *United States v. Abernathy*, 8 F.3d 30 (9th Cir. 1993) ["Because the sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility, the district court's determination is entitled to great deference on review."]; *United States v. Ford*, 989 F.2d 347, 352 (9th Cir. 1993) (citing U.S.S.G. Sec. 3E1.1 application note 5 (1991)); *United States v. Johnson*, 911 F.2d 1394, 1402 (10th Cir.), *cert. denied*, 498 U.S. 1050 (1991).

> the unique circumstances of the particular case before it. A district court is also likely to have seen more *ordinary* Guidelines cases, for appellate courts hear only the comparatively few cases that counsel believe present a colorable appeal. *See The Federal Sentencing Guidelines: A Report on the Operations of the Guidelines System* 49, 245 (December 1991) (85% of Guidelines sentences not appealed). To ignore the district court's special competence – about the 'ordinariness' or 'unusualness' of a particular case – would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case, which reactions, reduced to written reasons for departure, can help the Commission determine whether, and how, Guidelines revision should take place. *See* p. 946, *supra*; U.S.S.G. Ch. I, Pt. A intro. comment. (4)(b). *Thus, appellate courts should review the district court's determination of 'unusualness' with 'full awareness of, and respect for, the trier's superior "feel" for the case,' Diaz-Villafane, 874 F.2d at 50, not with the understanding that review is 'plenary.' Contra* United States v. Carr, 932 F.2d at 72; United States v. Pozzy, 902 F.2d at 138."

Even the circuit that reversed the present sentence is sharply divided about the degree of deference to be shown to the district court in the area of departures. As Judge Noonan wrote in *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991):

> In making a decision in any particular case, good judgment will often require the evaluation of a complex of factors. No single factor may be enough to point to the wise course of decision. But a wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge,

and influence each other that will lead to the correct decision. *Cook*, 938 F.2d at 153.

This Court is urged to conclude that while the current federal law of sentencing clearly limits the area in which the district judge may exercise discretion, where the trial judge does so, its vantage point and perspective will still, under the Guidelines, often uniquely qualify that judge to determine (1) whether aggravating or mitigating factors warranting departure are present; and (2) the extent of departure that is warranted based on those factors identified.[38]

In the present case, then, this Court is urged to adopt the view of *Rivera* and *Cook* in evaluating departures based on the district court's perception that a combination of unique factors justify a sentence outside the applicable guideline range.

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[38] Once the Court has identified one, or more than one, lawful basis for a downward departure, the Court may determine the degree of departure that is appropriate based on *all* the facts and circumstances in the case, whether or not each would justify a departure if considered alone. In *United States v. Cook*, 938 F.2d 149 (9th Cir. 1991), the Court of Appeals held that a "unique combination of factors" may constitute a "mitigating circumstance" which would justify a downward departure, even though no single factor would justify a departure when considered alone. *Id.* at 153; *accord United States v. Anders*, 956 F.2d 907, 911 (9th Cir. 1992); *United States v. Floyd*, 945 F.2d 1096, 1099 (9th Cir. 1991), *corrected*, 956 F.2d 203 (9th Cir. 1992); *see also United States v. Sklar*, 920 F.2d 107, 117 (1st Cir. 1990) ("We do not mean to imply . . . that factors, inadequate to warrant departure when taken in isolation, may not in combination suffice to remove a case from the heartland . . . "). Such a departure may be appropriate when " 'a court finds an atypical case,' one 'where conduct significantly differs from the norm.' " *Cook*, 938 F.2d at 153 (quoting U.S.S.G. Ch. 1, Pt. A, § 4(b)).

Sub-Issue Three

When the circuit court reviews the application of an "encouraged" ground for departure, should it focus on the "real offense" or "charge offense" in determining if the case is in the "heartland" as that term is used by the United States Sentencing Commission?

In this case the district court followed the mandate of the Guidelines in fixing the applicable guideline sentencing range by beginning with a base offense level of 15 for the "offense conduct" of aggravated assault under U.S.S.G. § 2A2.2; adding 4 levels for the use of a dangerous weapon (baton);[39] increasing the offense level 2 more levels for bodily injury;[40] and *then adding 6 additional levels for the violation of the "charge offense" 18 U.S.C. § 242.*[41]

In concluding that the district court erred in departing downward the circuit court erroneously focused on the "charge offense" of violation of civil rights. But the district court clearly did not depart downward 5 of the 6 levels in the Guidelines sentence solely based on a finding that the victim provocation took this case out of the heartland of that charged offense.

Rather, the central focus of the Guidelines, as set forth in the introductory policy statement is to look to the actual conduct of the defendant, rather than merely

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[39] U.S.S.G. § 2A2.2(b)(2)(B).

[40] U.S.S.G. § 2A2.2(b)(3)(A).

[41] U.S.S.G. § 2H1.4(a)(2) relating to wilful deprivation of civil rights.

looking to the crime charged in the abstract.[42] Moreover, the *base offense level* is always obtained under the Guidelines by looking first to Chapter two - Offense Conduct.

This focus of the Guidelines calculation of the sentence first on the actual offense conduct, and determining the sentence primarily on that conduct is the reason that the most significant element of the Guidelines sentence in this case is the base offense level of 15, for aggravated assault.

As is discussed below, the district court properly found that the permitted (or encouraged) ground for departure of victim misconduct was present in this case, and that it was a proper basis for a 5 level downward departure here.

The circuit court's conclusion that this was an incorrect application of the guidelines was predicated on its view that this case should be seen as a civil rights case for the purpose of departure.[43]

But the Guidelines make no such stipulation.

Rather, the Guidelines permit the district court to treat each element of the sentence as either falling within,

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[42] See generally, U.S.S.G., Ch. 1, Pt. A, Section 4, *The Guidelines' Resolution of Major Issues (Policy Statement)*, Subsection (a) *Real Offense vs. Charge Offense Sentencing*. "The guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of guns, or the amount of money actually taken . . . "

[43] *Koon*, 34 F.3d, at 1459-1461.

or falling outside of the heartland of that type of offense conduct.[44]

Here, if the "heartland" analysis focuses on the aggravated assault element of the sentence, the victim provocation is a proper basis (in principle) for departing, since it is an encouraged ground for departure in assault cases, *and* the degree of departure (5 levels out of the 15 levels for the aggravated assault element of the Guidelines sentence) appears eminently reasonable.

Moreover, this departure does no violence to the extra punishment the Guidelines, and Congress (apparently) called for in cases of criminal violation of civil rights, because the departure for the atypical aspect of the assault element of this case leaves the additional 6 level upward adjustment to the Guidelines sentence based on the civil right violation undisturbed. This additional sentence for that element of the offense conduct completely answers the circuit court's concerns that a downward departure for the provocation which takes the assault element of the case out of the heartland will circumvent the intended punishment for the civil rights violation. *That* element of the offense conduct was considered by the Commission and petitioner received the additional 6 level upward adjustment for it.

Turning to the victim provocation departure, it appears to be clearly within the anticipated downward

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[44] Thus, the circuit courts have approved downward departures where a particular sentencing adjustment "overstates the seriousness" of the offense as to the conduct of a particular defendant. See e.g. *United States v. Floyd*, 945 F.2d 1096, 1099 (9th Cir. 1991); *United States v. Roe*, 976 F.2d 1216 (9th Cir. 1992); (2) *United States v. Lawrence*, 916 F.2d 553, 555 (9th Cir. 1990).

departure under the Guidelines section that specifically identifies it as a ground for departure, and set out the factors to consider in deciding whether and to what degree departure is warranted in a particular case.

In this case, if the conduct of the victim may be viewed as mitigating, it would appear to be an excellent factor to serve as a basis for departure, precisely because the Guidelines do not include any specific adjustments for victim conduct that is mitigating.

Under the general principles set forth above, then, victim conduct that mitigates the "offense conduct" in this case would appear to fit into the rationale of 18 U.S.C. § 3553(b):[45]

> " . . . as a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines" (See also U.S.S.G. § 5K2.10 (Policy Statement) [same].)

Since the mitigating circumstance of victim conduct is not "taken into consideration" at all in computing the Guidelines Sentence, it clearly is a legitimate basis for downward departure.

Moreover, the Guidelines Commission specifically authorized downward departure on the basis of victim conduct. U.S.S.G. § 5K2.10 provides:

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[45] "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) *unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." [Italics supplied.]

"If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics in comparison to those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented."

In this case the district court departed on the basis of the fact the Mr. King's wrongful conduct contributed significantly to provoking the offense behavior. The government did not seriously contend that Mr. King's conduct was lawful. The evidence presented at trial established that Mr. King was not merely that of a "disrespectful and obstreperous drunk." He was acting in a manner that far exceeded such benign conduct. In fact, the district court concluded, based on the trial evidence that:

1. Mr. King acted in a dangerous manner in his conduct of recklessly evading detention and arrest by

driving at high rates of speed to avoid being stopped at all by the police. This conduct was life threatening.

2. Did not obey police commands to submit to police authority.

3. Resisted lawful arrest to such an extent that (it is undisputed) the police *lawfully* used deadly force, in the form of a taser to subdue him.

4. Even after being tased, he posed a perceived danger to Defendant Powell, by continuing to refuse to obey police commands, by refusing to submit to arrest, and by actively resisting arrest.[46]

5. During this period, he posed a physical threat to Defendant Powell by getting up and running in his direction. "He then rapidly rose to his hands and knees, and to his feet. He turned, outstretched his arms forward, and charged towards Officer Powell."

All of this conduct was engaged in by a person who was, in fact, a convicted felon, who had not been searched, and who the district court found officers could reasonably believe was on PCP.[47] This wrongful conduct of the victim forms a powerful basis for a downward departure in this case under the factors listed in § 5K2.10. Looking at those listed factors in turn, they each support the district court's decision to departure.

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[46] "He resisted and became combative, forcing the officers to retreat." POW E.R. 753.

[47] "[B]ecause of Mr. King's erratic and recalcitrant behavior." POW E.R. 756.

The "size and strength" of Mr. King at the time of the offense conduct in this case was referred to by the district court in its findings of fact.[48]

Moreover, another "relevant physical characteristic" in this case includes the fact that he was tased, but could still control his motor functions, get up, and charge Defendant Powell.

At the very least, the reasonable perception of one in Defendant Powell's position would be that Mr. King possessed remarkable physical strength after apparently (at least) being tased by Sgt. Koon.

Again, there is little doubt that in this case Mr. King "persisted" in his dangerous actions. He did not yield during a high speed auto chase, and he continued to resist arrest as police commands and use of force escalated. Defendant Powell did approach Mr. King to cuff him prior to the point at which Mr. King arose. If he had succeeded in cuffing Mr. King, the confrontation that included the "offense conduct" would have been avoided.

Given the information Defendant Powell had about Mr. King's ability to, and apparent determination to, effectively continue to resist lawful commands of the police both before and after the taser was used, Defendant Powell "reasonably perceived" that he was very dangerous. This perception was, reasonably, heightened by two factors: (i) an objectively reasonable assumption by a police officer in Defendant Powell's position that Mr. King was under the influence of PCP, or some similar

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[48] "Mr King was appreciably larger than both Koon and Powell . . . he was a felony suspect." POW E.R. 782.

stimulant; (ii) Defendant Powell's role in the arrest of Mr. King.[49]

Considering the potential that Mr. King was possessed of chemically enhanced strength and resolve, Defendant Powell could reasonably have perceived his conduct to pose a very serious threat of harm to him and his fellow officers.

Furthermore, considering the fact that when he is acting lawfully, properly, and within L.A.P.D. policy, an officer in Defendant Powell's position is not trained to act unilaterally, but is trained to rely in large measure on information being relayed to him by the Sergeant in charge of the arrest, Defendant Powell would reasonably have perceived Mr. King to be very dangerous indeed, since Sgt. Koon was yelling to him to administer more and more frequent baton blows to Mr. King to subdue him.

Mr. King was an unsearched felon, on parole, who was willing to endanger lives in order to evade arrest while in his car, who withstood a taser charge, who persisted in disobeying police commands despite the presence of a sizable number of uniformed, armed police officers, who physically resisted arrest, and who was

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[49] As discussed below, the uncontroverted evidence at trial was that when an unsearched suspect is resisting arrest, it is the responsibility of the ranking officer to take charge of the scene, and it is the responsibility of the officers actually effecting the arrest to rely on information given to them by the officer in charge from a more objective vantage point.

capable and willing to stand up from a prone position and move in the direction of officer Powell.[50]

Mr. King "actually presented" a danger to appellant. Despite repeated commands to him and the lawful use of the very formidable device of a taser gun, Mr. King refused to comply, or to show his hands, or keep them away from his mid-section where he could have concealed a weapon. Clearly, in the situation confronting the defendants, the lack of knowledge that Mr. King was not armed, and his conduct in preventing the officers from searching him, and preventing the officers from immobilizing his hands (by cuffing, e.g.) substantially contributed to the danger he and his conduct presented.

In addition, his "bizarre" behavior, such as dancing and acting in a boisterous, disrespectful, and obstreperous manner also contributed to the danger he presented *in light of the other facts discussed above*. This conduct by a detainee who was very actively resisting lawful arrest in the early moments of the police encounter would make any person in Defendant Powell's position extremely wary since it made Mr. King appear to be not only dangerous, but especially dangerous because he was unpredictable. He acted in a way that was irrational,[51] and simply strange.[52]

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[50] Again, the district court identified this factor in its *Sentencing Memorandum*, 833 F.Supp. 769.

[51] If only because he appeared to be willing to resist arrest against great odds of numbers of police officers.

[52] This behavior was so "bizarre" and potentially dangerous that CHP officer Melanie Singer, in the early stages of the encounter with King, found it necessary to draw her weapon.

Such conduct may always be said to be unsettling, but when it is manifested by a man who has already engaged in life threatening behavior (recklessly evading the police), who has also taken a taser jolt and gotten back up on his feet within seconds, this strange conduct would be more than merely unsettling, it would be reason to fear that man as a substantial danger.

Again, Judge Reinhardt's dissent demonstrates that the panel opinion is in error in too narrowly construing the reach of that section which specifically authorizes downward departure on this ground. The panel decision below is directly in conflict on this point with the Eighth Circuit's opinion in *United States v. Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). There, the court found the victim's behavior which preceded the violent assault of the victim (stabbing) to have justified the district court in departing substantially below the applicable guideline sentence.

In that case the defendant was convicted of stabbing the victim in the chest with a nine inch knife requiring emergency medical attention and hospitalization.

The district court imposed a fifteen month sentence for the crime of assault resulting in life threatening injuries with a dangerous weapon. This was a substantial departure below the applicable guideline range and it was imposed on the basis of the victim's antecedent conduct under U.S.S.G. § 5K2.10 (Policy Statement), which defendant here also relies upon.

While characterizing the victim's conduct as "consensual sexual foreplay" the government appealed the sentence asserting that the district court's departure from the Guidelines was (1) based on clearly erroneous factual

findings; (2) based on mitigating factors adequately taken into account by the Guidelines; and (3) unreasonable. (*United States v. Yellow Earrings, supra,* 891 F.2d 650, 651-652) The Court held:

> "The Government contends that the district court improperly considered victim conduct as a mitigating factor warranting departure. Specifically, the Government contends that the Guidelines permit departure only for wrongful victim conduct and then only to the extent merited by the factors set out in section 5K2.10. According to the Government, Struder's conduct fails to satisfy either criteria. The Government's arguments to this effect border on the frivolous."

The activity that provoked the stabbing in *Yellow Earrings, supra,* was not contemporaneous with the crime. Nor did the crime follow immediately after the provocation. Rather, the sexually offensive remarks of the victim were made prior in time to his return to the room where the defendant had armed herself with a large knife, and stabbed him. The government argued there that since the offense was not immediately tied up with the offense, it was not provoked by the conduct within the meaning of U.S.S.G. § 5K2.10. The Eighth Circuit rejected this argument, finding that the offense was provoked by the antecedent activity, even though it had ceased when the crime was occurred. The circuit court improperly acted as a fact finder in determining that the antecedent behavior of Mr. King did not provoke the criminal activity of the defendant – despite the district court's conclusion it did.

In fact, by focusing on a finding of the trial court that at the time of the offense conduct, Mr. King "was no longer resisting arrest . . . [and] posed no objective threat,

and the defendant's had no reasonable perception of danger" (34 F.3d, at 1458) the panel opinion looked to the wrong facts. That conclusion is the *only reason* the District Court found the conduct of appellant to be criminal. It does not justify the further conclusion (reached by the panel) that the offense conduct was not provoked within the meaning of § 5K2.10. If Mr. King were resisting arrest or posing an objective threat or reasonable perception of danger, there would have been no crime at all. No where does the guideline require a "reasonable perception of danger" before a finding of victim provocation is appropriate.

There can be no doubt that the parallels between the cited case and the present case are substantial. The Court in *Yellow Earrings* noted:

> "The above evidence demonstrates that Struder, at the very least, pushed Yellow Earrings, verbally abused her and attempted to publicly humiliate her when she refused his request for sexual intercourse. In addition, Yellow Earring's personal recounting of the incident strongly suggests that had Struder accepted "no" for an answer in a reasonably responsible fashion, his subsequent misfortunes would never have transpired." 891 F.2d at 650.

Clearly, the events that were held "provocative" of the offense conduct, preceded it. Just as clearly, here as in the cited case, the offense conduct flowed from lawful conduct that responded to the victim's improper conduct, and it can be said that if Mr. King had responded to the lawful commands of the officers "in a reasonably responsible fashion, his subsequent misfortunes would never have transpired." This is not an argument that the officer's conduct was excused, but it is one that the panel did

not take account of in rejecting the District Court's bases for downward departure, despite the citation of *United States v. Yellow Earrings, supra,* by the District Court and petitioner.

Clearly, the language of the Guidelines policy statement itself fits the facts of this case, and the provocative conduct of the victim here substantially provoked the offense conduct. As such, the departure of 5 levels was both lawful and "reasonable" under the circumstances of this case.

CONCLUSION

This Court is urged to conclude that a district court may base a departure on any ground not prohibited by the Guidelines, or not fully considered by the Commission in promulgating them. Here, that rule permitted the district court to use the four grounds identified because the first three were not prohibited, and at least two of them were not considered at all.

In addition, although much of the discretion, and thus opportunity for disparity has been removed by the Guidelines, the district court retains both an area of discretion and a unique vantage point for exercising that discretion in the area of departure, and in determining how and to what extent a factor or combination of factors unique to the case before it mitigates to the point that a sentence outside the applicable guideline range is warranted. Here, the district court did not abuse his discretion in reasonably departing downward three levels based on the combination of the unique mitigating factors he identified in his sentencing opinion.

Finally, when the focus of the "heartland" analysis is properly directed to the offense conduct element of the guidelines to which it relates, it is clear that the mere fact that the "charge offense" in this case is a criminal civil rights violation does not preclude victim misconduct downward departure. Since here, the district correctly applied that encouraged ground for downward departure, and further since the degree of departure is reasonable in light of the significant provocative conduct and the level of departure (5 of 15 levels assigned to that element of the Guidelines sentence), the departure on that ground should also be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

Nos. 94-1664 and 94-8842

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STACEY C. KOON and
LAURENCE M. POWELL

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF PETITIONERS

National Association of Police Organizations, Inc.
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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Stacey C. Koon and Laurence M. Powell's petitions for reversal of the judgement in this case of the United States Court of Appeals for the Ninth Circuit which vacated the original sentences of petitioners and remanded their cause for resentencing.

NAPO is a nationwide association of labor and trade organizations representing state, local and federal law enforcement officers. Among other entities, NAPO represents the Los Angeles Police Protective League, the certified labor bargaining agent representing the bargaining units which include petitioners Koon and Powell. NAPO also represents law enforcement officers throughout the rest of the state of California, the Ninth Circuit, and the United States. Through its state and local affiliates, NAPO actively represents approximately 185,000 sworn law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers' Rights Center, which advocates the necessity of assuring fundamental due process rights for law enforcement officers in the face of increasing political pressures for the investigation and prosecution of police.

NAPO has an important interest in this matter, as the case presents issues the resolution of which will define the extent to which the particular and unusual circumstances attendant upon the criminal prosecution and conviction of a police officer may be properly taken into consideration by a

trial court in passing sentence.

Internal police department investigation into the conduct of individual officers is now routine. Civil and criminal prosecution of individual officers is rapidly increasing at both the state and federal levels. Such cases frequently attract intense publicity and are likely to arouse prolonged and emotional public debate. Officers' basic rights are often in danger of being sacrificed on the altar of political expediency. A clear enunciation of the rights secured to individual officers accused of wrongdoing is of crucial value to the officers represented by NAPO, as well as to the various departmental, judicial, defensive and prosecutorial entities involved.

NAPO has received the written consent of petitioners Koon and Powell and of respondent the United States of America to the filing of this brief as required by Rule 37.3 (a) of the Rules of this Court. The original copies of all consents have been filed with the Clerk of the Court as required by that Rule.

SUMMARY OF ARGUMENT

The United States Sentencing Guidelines are not intended to be, nor do they constitute, an exhaustive, finite and exclusive set of factors to be considered by a trial court in passing sentence. The full range of human conduct and circumstance which might prove relevant to the determination of an appropriate sentence for a given offense is too vast and complex to be completely anticipated in any finite compilation of precepts. This is particularly true in the extraordinary case of the sentencing of a police officer for *criminal* federal civil rights misconduct in the course of duty.

Several factors unique to the offense and actors in this case were properly considered in this case by the original sentencing court below. These factors of provocation and victim misconduct were not already incorporated into the relevant Guidelines by the United States Sentencing Commission. The petitioners are also at unique and extreme risk in prison and have suffered additional punishments beyond their prison terms because of the fact that they are former law enforcement officers. These factors constitute circumstances which were properly taken into account by the trial court in determining an appropriate sentence in this case.

Under either a deferential or *de novo* standard of review, they remain viable and appropriate circumstances for consideration by a sentencing court and provide ample justification for the departure sentences meted out to the petitioners in this matter.

ARGUMENT

I. PROVOCATION AND VICTIM MISCONDUCT.

A. The Ninth Circuit erred in concluding that "provocation" or victim misconduct is included in the base offense level for U.S.S.G. § 2H1.4, 18 U.S.C.A.App., so that such a circumstance can only justify a downward departure in the most extreme case.

Without any data whatsoever, nor any support from the publications of the United States Sentencing Commission (hereinafter "the Commission"), the Ninth Circuit concluded that some degree of provocation or victim misconduct was typical of most criminal violations of 18 U.S.C. § 242. Accordingly, the Court of Appeals concluded that victim misconduct could be a ground for departure only in the most extreme of cases. This holding is manifestly incorrect and inconsistent with the United States Sentencing Guidelines and policy statements promulgated by the Commission..

1. Chapter Five of the Guidelines demonstrates that the Commission did not take victim conduct into account in formulating U.S.S.G. § 2H1.4, 18 U.S.C.A.App. (1989).

Policy Statement U.S.S.G. § 5K2.0 p.s., 18 U.S.C.A.App. (Grounds for Departure)[1] provides in relevant

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[1] Citations are to the version of the United States Sentencing Guidelines (hereinafter "the Guidelines") and policy

part:

> The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart [5K2] seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines . Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Section 5K2.10 (Victim Conduct) expressly sanctions a downward departure "[i]f the victim's conduct contributed substantially to provoking the offense behavior." It does not preclude reliance on this ground for departure with respect to any offense. Section 5K2.10 does state that "[v]ictim misconduct *ordinarily* would not be sufficient to warrant

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statements which took effect on November 1, 1989, unless otherwise expressly noted.

application of this provision in the context of [sexual abuse cases]" and "*usually* would not be relevant in the context of non-violent offenses" (emphasis added). But this language only reinforces the conclusion that the Commission anticipated that victim provocation *would* often be a ground for departure in other cases, including the offenses at issue here.

Together, §§ 5K2.0 and 5K2.10 mean that, unless otherwise specified in the Guidelines, the Commission did not take into consideration victim provocation in formulation of the Guidelines. Victim provocation is not a specific offense characteristic for any of the civil rights violation Guidelines nor for any other offense. Similarly, none of the Guidelines, official commentary or any other Commission publication indicate that victim provocation is included in the base offense level.[2] Only one offense for which there is a Guideline, voluntary manslaughter (§ 2A1.3), necessarily includes some form of provocation as an element. And the provocation inherent in voluntary manslaughter results in a ten-level reduction, from 38 to 28, compared to the offense level for the otherwise most analogous offense, that of second-degree

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[2] Had the Commission instead believed the absence of provocation to be an aggravating factor, it almost certainly would have said so. This is because the Commission recognized that courts would be more reluctant to depart above the Guidelines than below. *See* the Commission's *Supplementary Report to Congress on the Initial Sentencing Guidelines and Policy Statements*, June 18, 1987 (hereinafter "*Supplementary Report*"), at 66 ("The possibility of reversal on appeal might make departure above the guidelines rare (occurring primarily in truly extreme cases), while departures below the guidelines likely would be more frequent.").

murder (§ 2A1.2).

An examination of § 5K2.10 suggests that the Commission chose not to provide a specific adjustment for victim misconduct because doing so was impractical and unimportant. Section 5K2.10 lists five factors, all of them highly case-specific, which should be considered in determining whether, and to what extent, to depart. It simply is not possible to write a guideline to assign a single number to such an adjustment. And there is no real need to do so, considering that the types of offenses to which it might be applied form a negligible percentage of the cases prosecuted in the federal courts.[3] In addition, the *Supplementary Report* does not quantify the effect of victim provocation in the sample of cases analyzed by the Commission, implying that the Commission lacked adequate data to do so. *See Supplementary Report* at 27-39.[4] By adopting a policy statement approving a non-specific downward departure for victim misconduct, the

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[3] The Commission's decision to mandate a ten-level reduction for the provocation inherent in voluntary manslaughter does not detract from this conclusion. In dealing with voluntary manslaughter, any reduction made by the Commission *vis-a-vis* the Guideline for second-degree murder would be a quantified reduction based on victim provocation *by definition*. The Commission's choice of ten levels was, moreover, far more lenient than the district court's five-level departure in the case at bar.

[4] The tables in the *Supplementary Report* do, however, show that in the analogous comparison between second-degree murder and manslaughter, the data supported an average eight-level reduction for provocation. *Id.* at 27.

Commission not only encouraged district courts to reduce sentences for this reason, but allowed them to tailor the adjustment to the facts of each case.

2. The history of U.S.S.G. § 2H1.4 also demonstrates that the Commission in fact did not take victim misconduct into account when formulating that Guideline; and victim misconduct is a proper ground for departure from that Guideline.

It is readily apparent that the Commission did not take into consideration victim misconduct when formulating the Guideline for violations of 18 U.S.C. § 242. Victim provocation is not an element of these offenses, which clearly can occur without it. The presence or absence of victim misconduct is, as the trial court recognized, a highly significant factor in evaluating the egregiousness of the offense, as well as the dangerousness of the offenders. Yet the Guidelines do not discuss provocation in the context of civil rights offenses.

In setting the Guidelines for civil rights offenses, the Commission used a broad-brush approach. "[A] review of civil rights cases led the Commission to conclude that the guidelines for such offenses primarily should be tied to those for the underlying crimes, with an increase to reflect the civil rights violation as an aggravating factor." *Supplementary Report* at 18. Such an approach implicitly carries with it an acceptance of the adjustments, including grounds for departure, applicable to the underlying offense, and the Guidelines now expressly state that, when a Guideline is cross-referenced, all adjustments from Guidelines Chapters Two and Three also apply. *See* U.S.S.G. § 1B1.5 18 U.S.C.A.App. (1993) ("An instruction to

use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross-references, and special instructions) . . . If the offense level is determined by a reference to another guideline . . . the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided."). Violations of 18 U.S.C. § 242 may or may not involve violence, and the Commission was aware that victim provocation generally would be an appropriate ground for departure when the victim's conduct evoked a violent reaction. Given that a civil rights offense would clearly be more serious if wholly unprovoked, the Commission's decision to tie the Guidelines for *all* civil rights violation cases to the characteristics of the underlying offense (as opposed to treating civil rights violations cases as independent offenses in their own right) is indicative of the Commission's failing to adjust for, and *a fortiori* to consider, victim provocation or misconduct as a factor inherent in civil rights offenses committed by police. This is exactly what § 5K2.10 addresses.

The conclusion that § 2H1.4 does not take victim misconduct into account finds further support in the history of the amendments to the civil rights Guidelines. As originally promulgated, § 2H1.4 provided for a base offense level of 10 or 2 plus the level applicable to any underlying offense, whichever is higher. In the 1989 amendments, this was changed to 10 or 6 plus the level applicable to any underlying offense, whichever is higher. The rationale for this amendment was to make the Guideline sentence consistent with the Guideline sentence for other civil rights offenses if those

offenses were committed by a person acting under color of authority. Thus, in proposing the amendment, the Commission stated:

> Reason for Amendment: This amendment corrects an anomaly between the offense level under this section and § 2H1.5 [Other Deprivations of Rights or Benefits in Furtherance of Discrimination] . . . Section 2H1.4 is similar to § 2H1.5 in that it may or may not involve the use of force. Under § 2H1.4 however, the offense must involve the abuse of actual or purported legal authority. The base offense level of 10 used in § 2H1.4(a)(1) has a built-in 4-level enhancement (which corresponds to the base offense level of 6 under § 2H1.5(a)(1) plus the 4-level increase for a public official). There is an anomaly, however, when the base offense level from (a)(2) is used. In such cases, § 2H1.4 results in an offense level that is 4 levels less than § 2H1.5 when the offense is committed by a public official.

54 Fed. Reg. 21348, 21366 (1989).[5]

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[5] The Commission also erred in analogizing violations of 18 U.S.C. §§ 241, 242 to the offenses covered by the other civil rights Guidelines, since no discriminatory motive is required. The absence of proof of a discriminatory motive here would thus support a two-level downward departure.

As so amended, § 2H1.4 produces the same offense level for a public official as do § 2H1.1 (Conspiracy to Deprive of Civil Rights; Going in Disguise to Deprive of Civil Rights) and § 2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination), as well as § 2H1.5. Yet many of these offenses, especially ones that fall under § 2H1.1, could involve provocation only remotely, if at all. It is unreasonable to believe that the four-level increase for offenses committed by public officials assumes provocation when the offense is violent and unpremeditated, when it obviously does not do so in other circumstances. Because offenses that fall under § 2H1.5 and the other Guidelines in Part 2H would be quite unlikely to involve provocative victim conduct, whereas those falling under § 2H1.4 might or might not, the Commission's decision to equate all these offenses evinces a failure to take victim misconduct into account in formulating § 2H1.4.

B. In any event, the Ninth Circuit misconstrued the scope and breadth of the Guideline § 5K2.10 policy statement.

As Judge Reinhardt stated in his dissent from the denial of rehearing *en banc* below, "[t]he panel's analysis of the five-point departure . . . is premised on a highly restrictive and inflexible reading of the Guidelines . . . The panel reversed Judge Davies' [*sic*] departure, holding that, in the context of excessive force cases, an act provokes only if it precipitates an immediate response." *United States v. Koon*, 45 F.3d 1303 at 1307. More specifically, the Ninth Circuit opined:

A close examination of the district court's

> sentencing memorandum reveals that the court ultimately did not conclude that [petitioners] were provoked in precisely the manner contemplated by § 5K2.10 . . . . [Although the district court found "that [the victim's] wrongful conduct was the initial provocation for the subsequent course of events."] the court found that those factors were no longer present when the [petitioners'] conduct became criminal. The court recognized that by the time Powell struck, and Koon permitted to be struck, those blows for which [petitioners] were criminally liable, [the victim] no longer presented a danger, and was no longer persisting in misconduct. [¶] The district court thus determined not that [the victim's] misconduct "provoked" the offense conduct -- the "provocative" behavior had "subsided" before [petitioners] committed their criminal acts -- but that "the incident would not have escalated to this point, indeed, it would not have occurred at all, but for [the victim's] initial misconduct."

United States v. Koon, 34 F.3d 1416 at 1459 (9th Cir. 1994), *reh'g denied*, 45 F.3d 1303 (9th Cir. 1995). The Ninth Circuit not only mischaracterized the trial court's findings, but also misread the policy statement, which clearly is *not* "precise" but rather expansive, allowing for departure in a broad range of circumstances. As Judge Reinhardt recognized, "[t]he applicable policy statement plainly rejects the requirement of a tight nexus between the provocative behavior and the resulting unlawful conduct." 45 F.3d at 1307. Indeed, §

5K2.10 expressly endorses departure in circumstances that fall far short of the standard the Ninth Circuit would impose, such as when "an extended course of provocation and harassment [leads] a defendant to steal or destroy property in retaliation." The supposed requirement that the defendant's reaction be in immediate response to the victim's misconduct in order to successfully plead provocation as a defense was rejected long ago. *See e.g., People v. Maher*, 10 Mich. 212 (1862). Similarly, § 5K2.10 in no way requires an immediate reaction to the provocative conduct. To read such requirements into the section, which is broadly worded and deals merely with mitigation in sentencing, is insupportable.

Even if such a requirement did exist, however, it would have been met here. The district court found that the total time which elapsed between the point at which the victim ceased his wrongful conduct and the time the petitioners' unlawful conduct began was a mere twelve seconds. *See Sentencing Memorandum*, Appendix C to the *Petition for Writ of Certiorari* in *Koon v. United States*, Case No. 94-1664 (hereinafter "*Sentencing Memorandum*"), pages 101a-102a, 107a. Thus, not only is the Ninth Circuit's reading of the policy statement in error, but the factual predicate for its conclusion is missing.

The Ninth Circuit relied on *Graham v. Connor*, 490 U.S. 386 (1989), to support the proposition that, in excessive force cases, conduct does not violate the civil rights statutes unless it is unreasonable. While that may be true, it is also beside the point. Section 5K2.10 necessarily assumes that a defendant's conduct was unreasonable; otherwise one would be hard pressed to say that the defendant had committed any

criminal offense at all, even in the paradigmatic case of an assault. The policy statement deals not with a situation in which provocation is proffered as a complete or even partial defense, but rather with one in which the provocation does not rise to the level sufficient to constitute a defense at all.

Even when it suffices to exculpate the defendant or lower the degree of the offense, victim misconduct or provocation need not provoke a reasonable response in the accused. Thus, although courts historically have considered killing upon a sudden quarrel (or in the heat of passion) to be manslaughter, it is obvious that such a killing is considered unreasonable in that we expect a reasonable person to withstand the provocation, on pain of criminal prosecution and punishment. "What is really meant by 'reasonable provocation' is provocation which causes a reasonable man to lose his normal self control, and although a reasonable man who has thus lost control over himself would not kill, yet his homicidal reaction to the provocation is at least understandable [and his degree of guilt is mitigated from murder to voluntary manslaughter]." W. LaFave & A. Scott, Jr., *Criminal Law* § 7.10(b) at 654 (2d ed. 1986) Similarly,

> Provocation is said to be adequate "if it would cause a reasonable person to lose his self-control." But if a reasonable person would have committed the same offense, then arguably the defendant should merit complete exculpation for he acted no differently than the reasonable man. The actual standard probably is something less than this, just as the result of the defense is liability somewhat less than that

> normally imposed for an intentional killing. . . [¶] Adequate provocation commonly includes: [¶] (A) physical, unjustified attack, [¶] (B) mutual combat, [¶] (C) some instances of a threat of physical attack, . . .

P. Robinson, *Criminal Law Defenses* § 102(b)(2) (1984) (footnotes omitted). Clearly the district court was entitled to find that circumstances of this type existed in this case, even if the "reasonable police officer" might have reacted differently.

Although assault statutes typically do not make the many distinctions that are common in homicide statutes, provocation remains a relevant factor, especially at sentencing.

> Some statutes, while not providing a defense to assault and battery, sometimes specifically recognize some provocations, such as insulting and abusive words, as evidence mitigating punishment. Even absent statutory authority, courts sometimes impose a reduced sentence where an assault is committed under extreme provocation.

Robinson, *Id.* § 106 (h).

Here, § 5K2.10 provides ample authority for a downward departure. It is important to remember that in this case provocation is being considered as a sentencing factor, rather than even a partial defense. The relevant policy statement is broadly written, imposing no requirement that the response to a provocation be reasonable or that the provocation

itself be extreme. These are simply factors to be considered in determining the extent of departure. Police officers who overreact are neither as culpable nor as dangerous as those who might perpetrate premeditated acts of violence against innocent persons. The distinction made by the district court is eminently sensible and justified under the Guidelines and policy statements.

There is no basis for the Ninth Circuit's conclusion that a sentence reduction under § 5K2.10 for victim misconduct is inconsistent with the policy underlying the four-level enhancement for official misconduct in the civil rights cases Guidelines. This four-level increase reflects a conclusion that official misconduct is more culpable than similar misconduct committed by an ordinary citizen. But this conclusion does not preclude distinguishing among differing degrees of culpability. This is exactly what the trial court did in the case at bar, and properly so.

II. THE RISK OF ABUSE AND THE "ADDITIONAL PUNISHMENTS" INFLICTED ON PETITIONERS BECAUSE OF THEIR BEING POLICE OFFICERS.

Police officers are human beings. Although we might wish otherwise, they are subject to all human frailties. To ignore this fact and to impose punishment without regard for the particular circumstances involved will encourage conduct like that of the victim in this case. It will also serve to deter police officers from arresting violent and combative suspects, for fear that they, too, may be later judged to have overstepped

blurry bounds in a fluid and volatile situation, even as they thought they were doing right, only to wind up serving years in federal prison. R. Paz, *Civil Rights Laws: The Need for a New Look at an Old Bandaid* [*sic*], 14 Chicano-Latino L. Rev. 20, 21 (1994).

The federal courts of this country have traditionally been a place of vindication for the rights of the politically unpopular individual. In 1967, in another time of popular dissatisfaction with governmental policy being directed at individual representatives of the lawful authority of government, be they individual police officers or soldiers, this Court took the significant step of announcing what might seem a self-evident truth: "[T]hat policemen, like teachers and lawyers, are not relegated to a watered-down version of . . . rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

In the case at bar, the trial court honored this basic tenet of fairness and equity in the most extreme and difficult of events: the sentencing of police officers for criminal offenses committed in the course of their duties.

It must be emphasized at the outset that neither petitioner received anything like a slap on the wrist. Both men were sentenced to 30 months in federal prison, to be followed by two years of supervised probation. *Sentencing Memorandum* at 135a. Neither man will ever work again in his chosen profession. Both have been held up as an example and object of ridicule throughout the world. Any hope of quiet and private existence has been dashed. Neither will ever enjoy the emoluments of being a citizen, including the rights to vote, serve on a jury, or seek office. Both are quite likely to be

targets of attack for the rest of their lives, even after having completed their sentences. By and large, none of these collateral consequences of their convictions would occur but for the fact that these two men were police officers at the time of the offense.

In ordering a three-level departure downward (apart from the departure based on victim misconduct and provocation discussed above), the trial court correctly and accurately weighed the particulars of the cases of the two individual citizens before it and placed appropriately heavy emphasis on the extraordinary impact of a criminal conviction upon these two men, as well as on these men's extreme vulnerability to abuse in prison. None of these factors is prohibited from consideration by the Guidelines, yet still none independently was held by the district court to warrant a departure. Directly addressing this situation, the Commission has recognized

> [T]he possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case.

Section 5K2.0, commentary.

There is simply no avoiding the fact that this case became a focal point for an unprecedented amount of anger and

emotion throughout this nation and much of the world. *See* Government's closing argument to the jury, reproduced in *Petition for Writ of Certiorari*, in *Powell v. United States*, Supreme Court Case No. 94-8842 at 11. The two petitioners can be said, quite without exaggeration, to have been two of the most unpopular men in the nation at the time of their trial(s). Any citizen in their position would reasonably fear exposure to attack and retribution once incarcerated. Beyond this subjective, if well-founded, fear, however, also existed more objective and equally well-founded indicia of the petitioners' extreme and unusual vulnerability to abuse in prison.

Significantly, the United States Department of Justice itself, through its Bureau of Prisons (hereinafter the "Bureau"), has explicitly recognized the unusual vulnerability and potential targeting for abuse of police officers who are incarcerated. According to the Bureau, among those persons "who require special management attention" during the classification and monitoring of prisoners in custody are "inmate[s] with a background in law enforcement . . ." U.S. Bureau of Prisons Regulations, 28 C.F.R. § 524.72(h) (1995). Similarly, in delineating which persons prison staff may appropriately consider at risk of harm and in need of affirmative protection from the general prison population, the Bureau specifically includes the following:

> (1) Victims of inmate assaults;
> (2) Inmate informants;
> (3) Inmates who have received inmate pressure to participate in sexual activity;
> (4) Inmates who seek protection through detention, claiming to be former law enforcement officers,

> informants, or others in sensitive law enforcement positions, ***whether or not there is official information to verify the claim***;
> (5) Inmates who have previously served as inmate gun guards, dog caretakers, or in similar positions in state or local correctional facilities; . . .
> (8) Inmates about whom staff has good reason to believe the inmate is in serious danger of bodily harm.

U.S. Bureau of Prisons Regulations, 28 C.F.R. § 541.23(a) (1995) (emphasis added). As can be seen, the mere claim of being a former law enforcement officer, without any verification whatsoever, is sufficient to warrant protective custody, isolated from the general prison population. This unique treatment of these certain prisoners reflects the very real danger of physical harm to persons in prison who are even *perceived* to be police officers, let alone persons like petitioners, who were known nation-wide as police officers in a case ripe with notoriety.

Commentators, too, have noted the significantly increased risk of abuse faced by law enforcement officers in custody. Paz, *supra*, at 21; L. Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, 1992/1993 Ann. Surv. Am. L. 485, 502 (1993)("Among the most victimized members of prison inmate populations are former police officers and child molesters."). Clearly the trial court was well within its discretion to conclude that the petitioners possessed an "extreme vulnerability to abuse in prison." *Sentencing Memorandum* at 125a. Even under a *de novo* review, common sense as well as the weight of authority convinces us that the

risk of abuse is quite real and dangerous, and, as such, an appropriate and compelling factor in sentencing.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations respectfully requests that the Court grant petitioner Koon and petitioner Powell's applications and reverse the judgement in this case of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted this 9th day of November, 1995,

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Supreme Court, U.S.
FILED
JUN 19 1995
CLERK

(1)

No. 94-8842

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

LAURENCE M. POWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Laurence M. Powell's petition for issuance of this Court's writ of certiorari to the United States Court of Appeals for the Ninth Circuit with respect to the use of a law enforcement officer's administratively compelled testimony against him at trial.

NAPO is a nationwide association of labor and trade organizations representing state, local and federal law enforcement officers. Among other entities, NAPO represents the Los Angeles Police Protective League, the certified labor bargaining agent representing the bargaining unit which includes petitioner Powell. NAPO also represents law enforcement officers throughout the rest of the state of California, the territory of the Ninth Circuit, and the United States. Through its state and local affiliates, NAPO actively represents approximately 185,000 sworn law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers Rights Center, which advocates the necessity of assuring fundamental due process rights for law enforcement officers in the face of increasing political pressures for the investigation and prosecution of police.

NAPO has an important interest in this case, as the case presents issues concerning the fundamental and constitutional rights to due process enjoyed by law enforcement officers as

much as by any other individuals, which, unfortunately, have been and are in increasing danger of erosion due to prosecutorial reaction to perceived public "outrage" towards police. Internal police department investigation into the conduct of individual officers is routine. Civil and criminal prosecution of individual officers is rapidly increasing at both the state and federal levels. Officers' rights are in grave danger of being sacrificed on the altar of political expediency. A clear enunciation of the rights enjoyed by individual officers accused of wrongdoing is of crucial value to the officers represented by NAPO, as well as to the various departmental, judicial, defensive and prosecutorial entities involved.

NAPO has received the written consent of both petitioner Powell and respondent the United States of America to the filing of this brief as required by Rule 37.2 of the Rules of this Court. Copies of both consents are appended hereto as exhibits following the text of this brief.

SUMMARY OF ARGUMENT

The Ninth Circuit's affirmance of petitioner's federal criminal conviction in the face of the government's concession that at least one prosecution witness had been provided with a transcript of petitioner's admittedly compelled testimony prior to testifying[1] and despite the lack of the government's showing that that witness's testimony had not been shaped, altered or affected in any way, directly or indirectly, by knowledge of the contents of petitioner's compelled statement is based upon an unduly restrictive application of the protections of the Fifth Amendment's Self-Incrimination Clause and conflicts with other circuits and at least one state court of last resort. *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994), *reh'g denied*, 45 F.3d 1303 (9th Cir. 1995). The affirmance, if left uncorrected, will also have a profound chilling effect on the exercise and assertion of the Fifth Amendment's guarantee against compelled self-incrimination by individual officers and will upset the extant framework within which police department internal investigations are conducted throughout this country.

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1 *See*, Unreported Order of the District Court allowing prosecution witness Timothy Briseno's testimony against petitioner although Briseno previously received and read testimony of petitioner which had been compelled by internal affairs investigators, reprinted as Appendix F of the *Petition for Writ of Certiorari* in *Koon v. United States*, Case No. 94-1664 at pages 156a-158a.

ARGUMENT

Individual law enforcement officers execute their official duties under the greatest scrutiny. Their actions, both public and private, are continuously monitored and investigated by their own departments, civilian and professional review boards, state and local regulatory commissions, the print and electronic media, and state, local and federal investigators and prosecutors. This scrutiny has intensified within the last few years as isolated cases involving controversial police actions, including the case at bar, are cited as proof by some that all police cannot be trusted, that all police are brutal, or that all police are racist. Neither this Court nor the people of this nation would stand for such painting with a broad brush of other identifiable groups of individuals. Yet it has become sadly fashionable to negatively stereotype law enforcement officers in a way that would be intolerable if applied to African-Americans, women, Jews, Catholics, homosexuals, persons with disabilities or the elderly. State and federal prosecutors, not immune from the political pressures of the times, are at least tempted to afford individual law enforcement officers accused of wrongdoing a little less due process than another person similarly situated might receive.

The federal courts of this country have traditionally been a place of vindication for the rights of the politically unpopular individual. In 1967, in another time of popular dissatisfaction with governmental policy being directed at individual representatives of the lawful authority of government, be they individual police officers or soldiers, this Court took the significant step of announcing what might seem

a self-evident truth: "[T]hat policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). *Garrity* and its progeny have yielded a familiar and workable legal framework, well-grounded in the Constitution, for the securing by internal investigators of testimonial evidence from officers who may have knowledge of police misconduct. *See, e.g., United States v. Camacho*, 739 F.Supp. 1504, 1512-15 (S.D.Fla. 1990) (outlining settled constitutional standards of internal police investigations). This effective and constitutional procedure was initially followed in the investigative stages of the case at bar, and proved no obstacle to the *lawful* investigation and prosecution of alleged criminal misconduct. The prosecution grievously erred, however, once it introduced testimony against the petitioner from a witness who had received and read the petitioner's administratively compelled statements regarding the facts of the case.

Under the *Garrity* process, individual officers may be compelled to testify regarding allegations of misconduct, on pain of losing their jobs should they refuse, consistent with the Constitution only when those statements are immunized from use, "directly and indirectly", against the officer in any subsequent criminal proceeding. *Garrity*, 385 U.S. at 500. *Kastigar v. United States*, 406 U.S. 441, 453 (1972). Internal affairs investigators, prosecutors, defense attorneys, union representatives and individual officers are familiar with and understand the practical as well as constitutional dimensions of being called in and compelled to testify about allegations of police misconduct. *See*, Warnken, *The Law Enforcement*

Officers' Privilege Against Compelled Self-Incrimination, 16 U.Balt.L.Rev. 452, 492-515 (1987) (survey of various state statutes codifying constitutional procedures mandated by *Garrity*); *Rights of Police Officers During Internal Investigations: Hearing before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 102nd Cong., 2nd Sess., *passim* (1992) (testimony of witnesses reflecting status of police internal investigative procedure across country). The fact that the individual officer's testimony may not be used against him or her in a subsequent criminal prosecution does not prohibit the police department from appropriately disciplining the officer, including terminating him or her from employment. Nor does the fact that the particular statement and its fruit are prohibited to be used against the officer in a subsequent criminal proceeding prevent the investigation, arrest, charging, prosecution, conviction and punishment of the officer, through independent, non-compelled self-incriminating testimony or any other *lawful* means.

Federal investigators and attorneys in particular have become particularly practiced and adept at isolating Fifth Amendment violation-tainted evidence from trial prosecutors as well as other investigators who are continuing to actively work the case. *See,* Unreported Order of the District Court Granting [Petitioner's] Request for *Kastigar* Hearing, reprinted as Appendix E of the *Petition for Writ of Certiorari* in *Koon v. United States,* Case No. 94-1664 at pages 151a-153a. Most significantly, state and federal prosecutors have proved able in fact to secure convictions against officers guilty of criminal misconduct by *lawfully* and *constitutionally* prosecuting those

officers. Just as police have found that honoring suspects' constitutional rights has not frustrated their ability to secure arrests and convictions, so prosecutors have learned that defendants, including accused police officers, can be successfully prosecuted by *constitutional* means as a *practical* matter.

It being well-settled that the Fifth Amendment's protections may be properly demanded *by* individual police officers as legitimately as those protections may be demanded *of* police officers, officers, departments, investigators, courts and prosecutors have come to rely upon the settled law in this area to guide them in the administration of internal and administrative matters to a degree not found in any other profession. Seen in this context, the Ninth Circuit's circumscription of the extent of the protection of the Fifth Amendment's Self-Incrimination Clause is a matter of profound concern to law enforcement. At the individual level, officers, like all other persons in the Ninth Circuit, now reside under a judicial interpretation of the constitution that expressly refuses to recognize fundamental due process protections to the same extent as recognized by other circuits and state courts of last resort. *See, United States v. North ("North I")*, 910 F.2d 843, *modified, United States v. North ("North II")*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991) (discussing government's high but proper burden of proof in demonstrating that no direct or indirect use of immunized testimony against accused occurred); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S.Ct. 656 (1992); *United States v. Schmidgall*, 25 F.3d 1523 (11th Cir. 1994); *State v. Vallejos*, 883 P.2d 1269 (N.M. 1994) ("A prohibited use of

immunized testimony 'occurs if a witness's recollection is refreshed by exposure to the defendant's immunized testimony, or if his testimony is in any way "shaped, altered or affected," by such exposure.'") (quoting *Poindexter*, 951 F.2d at 373 (quoting *North I*, 910 F.2d at 863)), *But see, United States v. Bartel*, 19 F.3d 1105 (6th Cir.), *cert. denied*, 115 S. Ct. 113 (1994) (declining to require government to prove witness's testimony not in any way influenced by exposure to immunized testimony).

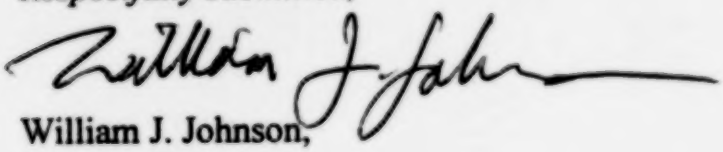
At the organizational level well-established, workable and effective means of addressing allegations of misconduct while honoring individual officers' fundamental rights are in substantial danger of being thrown into chaos because of the uncertainty injected into the system by the Ninth Circuit's ruling. At the professional level attorneys, police administrators, union representatives and shop stewards stand unsure of the status of the law and uncertain how best to advise officers and other clients regarding this most fundamental right. While some uncertainty may be inherent in advising clients of their rights under the law, this Court ought to grant the opportunity to clarify those rights when possible, as here.

This opportunity is all the more imperative when such a clarification would serve to vindicate the rights of persons who, despite being viewed as presently unpopular, or, rather, because of that fact, are especially in need of our constitution's protections.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations respectfully requests that the Court grant petitioner Powell's application and issue its writ to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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Supreme Court, U.S.
FILED
DEC 8 1995
CLERK

Nos. 94-1664 and 94-8842

In the Supreme Court of the United States

OCTOBER TERM, 1995

STACEY C. KOON, PETITIONER

v.

UNITED STATES OF AMERICA

LAURENCE M. POWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, in reviewing the district court's determination that several factors formed a valid basis for a departure from the sentencing range applicable to petitioners under the Sentencing Guidelines, the court of appeals correctly applied a de novo standard of review and correctly concluded as a matter of law that the district court in this case departed downward on the basis of invalid factors.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1664

STACEY C. KOON, PETITIONER

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v.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-79a)[1] is reported at 34 F.3d 1416. The court of appeals' denial of the petition for rehearing and suggestions of rehearing en banc (Pet. App. 80a-93a) is reported at 45 F.3d 1303. The sentencing opinion of the district court (Pet. App. 94a-138a) is reported at 833 F. Supp. 769.

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[1] References to "Pet. App." are to the appendix to the petition in No. 94-1664.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1994. The petitions for rehearing were denied on January 12, 1995. Pet. App. 80a-81a. The petition for a writ of certiorari in No. 94-1664 was filed on April 10, 1995. The petition for a writ of certiorari in No. 94-8842 was filed on April 12, 1995. The Court granted both petitions on September 27, 1995. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 3553(a) and (b) and 18 U.S.C. 3742(a)-(f) are reprinted in the appendix to this brief (App., *infra*, 1a-5a).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner Powell was convicted of willfully using unreasonable force during the arrest of Rodney King, in violation of 18 U.S.C. 242. Petitioner Koon was convicted of willfully permitting other police officers to use unreasonable force during King's arrest, in violation of 18 U.S.C. 242. Petitioners were sentenced to 30 months' imprisonment. The court of appeals affirmed the convictions, but vacated the sentences and remanded for resentencing.

1. In the early morning hours of March 3, 1991, Rodney King was driving while intoxicated on a freeway in Los Angeles, California. Officers of the California Highway Patrol (CHP) observed King's car speeding and began to pursue it. When the car left the freeway, the CHP officers radioed for help, and officers of the Los Angeles Police Department (LAPD) joined in the pursuit. The pursuit ended when King pulled his car into an entrance to a recreation area. Petitioner Powell was one

of the LAPD officers who pursued King. Petitioner Koon, an LAPD sergeant, arrived after the pursuit had ended and took command of the scene. Pet. App. 2a.

Officers ordered King and his two passengers to get out of the car and assume a felony prone position, *i.e.*, to lie face down on the ground, with arms and legs spread. King got out of the car, but he did not lie down. Eventually, King got down on his hands and knees but did not assume the felony prone position. Four officers, including Powell, attempted to force King into that position. King resisted and became combative, and the officers retreated. Koon fired two taser darts from an electric stun gun into King. Pet. App. 2a.

The events that followed were captured on a videotape made by George Holliday, which was an exhibit at trial (U.S. Exh. 20). As the videotape begins, it shows King rising from the ground in an attempt to escape. Powell struck King in the head with his baton. Powell and co-defendant Wind continued to strike King with their batons, and King fell to the ground. At 18 seconds on the tape, co-defendant Briseno put his hand on Powell's raised baton. From the 18th to the 30th second on the tape, King attempted to rise, and Powell and Wind again struck King with their batons. King then toppled to the ground. Pet. App. 2a-3a; U.S. Exh. 20.

From the 35th to the 51st second, Powell repeatedly struck King with his baton, as King lay on the ground. At approximately the 43d second, one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest or upper abdomen, and King rolled onto his stomach and lay prone. At that point, the officers stepped back and observed King for approximately ten seconds. Powell began to reach for his handcuffs. Pet. App. 3a; U.S. Exh 20.

At 1:07 on the tape, Briseno stomped on King's upper back or neck. After King writhed reflexively, Powell and Wind hit King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times, until approximately 1:26. At approximately 1:29, King put his hands behind his neck and he was then handcuffed. Pet. App. 3a, 102a.

Powell used his hand-held radio to request an "RA [rescue ambulance]" for the "victim of a * * * *" and Koon yelled the word "beating." In response, Powell laughed and described King's injuries in the radio call as "numerous head wounds." 2/26/93 PM Tr. 17-18; 3/5/93 PM Tr. 62-65; 3/24/93 Tr. 85; Exh. 19. After the arrest, Powell sent messages to another officer over the Mobil Digital Terminal, saying "ooops" and "I havent beaten anyone this bad in a long time." Koon sent a message to the police station stating: "U[nit] just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time." Pet. App. 3a.

King was taken to a hospital where he was treated for a fractured leg, multiple facial fractures, and numerous bruises and contusions. At the hospital, Powell said to King: "We played a little ball tonight, didn't we Rodney? * * * You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs. * * * Yes, we played a little ball and you lost and we won." Pet. App. 3a.

Koon, Powell, Briseno, and Wind were tried in state court in Simi Valley, California, on charges of assault with a deadly weapon and excessive use of force by a police officer. The four officers were acquitted on all charges, except for one count against Powell that resulted in a hung jury. Pet. App. 4a.

Thereafter, petitioners, along with Briseno and Wind, were indicted by a federal grand jury under 18 U.S.C.

242 for violation of King's constitutional rights under color of state law. Powell, Briseno, and Wind were charged with willfully using unreasonable force in arresting King. Koon was charged with willfully permitting the other officers to use unreasonable force during the arrest. The jury convicted petitioners and acquitted Briseno and Wind. Pet. App. 4a.[2]

2. The district court sentenced petitioners under Guidelines § 2H1.4 of the United States Sentencing Commission *Guidelines Manual* (Nov. 1992), which applies to violations of 18 U.S.C. 242. Pet. App. 96a, 108a. Section 2H1.4 prescribes a base offense level that is the greater of ten, or six plus the offense level of the underlying offense. The court found that the underlying offense for both petitioners was aggravated assault, for which Guidelines § 2A2.2(a) prescribes a base offense level of 15. Pet. App. 109a-112a. That led to a base offense level of 21. The court increased that offense level for both petitioners by four levels because a dangerous weapon was used (see Guidelines § 2A2.2(b)(2)(B)), and by two

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[2] At trial, the government contended that all blows after King toppled to the ground at 30 seconds on the videotape violated 18 U.S.C. 242. In rejecting Powell's challenge to the sufficiency of the evidence, the court of appeals determined that the evidence was sufficient to support the government's theory. Pet. App. 55a. At sentencing, however, the district court found that many of the blows after 30 seconds "may have been tortious," but because of King's slight movements and his failure to assume the felony prone position during that period, petitioners did not have the specific intent required for conviction under Section 242 at that point. *Id.* at 104a, 106a-107a. Rather, the district court found, the violation of 18 U.S.C. 242 did not begin until 1:07, after Briseno stomped King. *Id.* at 106a. In affirming that finding, the court of appeals stated that "[a]lthough we may not agree, the district court resolved [the] ambiguities [in the evidence] in favor of the defense," and "the government has not established clear error." *Id.* at 78a-79a.

levels because King had suffered bodily injury as a result of petitioners' unlawful conduct (see Guidelines § 2A2.2(b)(3)(A)). Pet. App. 112a-115a. The adjusted offense level was therefore 27. *Id.* at 115a, 118a. Because neither petitioner had a criminal record, they fell within criminal history category I. The sentencing range for an offense level of 27 and criminal history category I is 70 to 87 months' imprisonment. U.S.S.G. Ch. 5 Pt. A (Sentencing Table).

The district court, however, granted both petitioners a downward departure from the prescribed Guidelines range. It granted a three-level departure based on a combination of factors and a five-level departure based on victim misconduct. The departure yielded an offense level of 19, and a sentencing range of 30 to 37 months' imprisonment. Pet. App. 134a-135a. The court sentenced both petitioners to 30 months' imprisonment. *Id.* at 135a.

a. The district court based the three-level combination departure on (1) the additional punishment resulting from petitioners' job termination proceeding and susceptibility to abuse in prison; (2) the absence of a need to protect the public from further criminal activity by petitioners; and (3) the purported "specter of unfairness" resulting from successive state and federal prosecutions for the same conduct. Pet. App. 120a; see *id.* at 121a, 124a-131a.

With respect to the first factor, the court found that petitioners would face a job-termination proceeding, after which they would lose their positions as police officers, be disqualified from prospective employment in the field of law enforcement, and suffer the anguish and disgrace those deprivations entail. Pet. App. 127a-128a. The court also concluded that, because of the "widespread publicity and emotional outrage which have surrounded

this case," petitioners were "likely to be targets of abuse" in prison. *Id.* at 125a. As for the second factor, the court found that petitioners were not "violent, dangerous, or likely to engage in future criminal conduct," and that there was therefore "no reason to impose a sentence that reflects a need to protect the public from [them]." *Id.* at 129a. Finally, the court stated that successive state and federal prosecutions for the same conduct unfairly burdened petitioners. *Id.* at 130a. In the court's view, while the federal prosecution had not violated petitioners' constitutional rights, it had "raise[d] a specter of unfairness." *Ibid.* The court concluded that, although none of the three factors standing alone would justify a departure (*id.* at 120a), when "taken together," they did. *Id.* at 121a.

The court awarded the five-level downward departure pursuant to Guidelines § 5K2.10 (policy statement), which permits a departure "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior." Pet. App. 57a, 121a-124a, 132a. The court acknowledged that, "by the time [petitioners'] conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger." *Id.* at 123a. The court believed that Section 5K2.10 was nonetheless applicable because, but for King's speeding, petitioners would never have been present at the scene, and but for King's initial wrongful conduct in resisting arrest and attempting to escape, no force would have been necessary in the first place, and the incident would not have occurred at all. *Id.* at 122a-123a.

The court also held that, because of the role that King's misconduct had played in the offense, petitioners' conduct did not fall within the "heartland" of offenses contemplated by the guidelines that apply to excessive

force cases. Pet. App. 123a. The court viewed cases in which state officials deliberately use excessive force, without any cause to initiate the use of force, as the heartland of Guidelines § 2H4.1. The court concluded that the Guidelines do not adequately account for the differences between such heartland cases and cases in which an official's use of force is lawful at the outset. Pet. App. 123a-124a.

3. The court of appeals affirmed petitioners' convictions, but vacated their sentences and remanded for resentencing. Pet. App. 1a-79a. The court of appeals reviewed de novo the question whether the district court had authority to depart from the Guidelines sentencing ranges, while reviewing the district court's factual findings only for clear error. *Id.* at 57a. The court held that a district court has legal authority to depart only when a proposed "mitigating" factor has not been adequately considered by the Sentencing Commission, see 18 U.S.C. 3553(b), Pet. App. 57a, and only when that ground is consistent with the sentencing purposes and structure of the Sentencing Reform Act of 1984, *id.* at 58a (citing 18 U.S.C. 3553(a) (court "shall impose a sentence sufficient" to comply with the purposes of retribution, deterrence, incapacitation, and rehabilitation). The court added that

> [a]though § 3553(b) does not define the term "aggravating or mitigating circumstance," the term does suggest a factor that constitutes a permissible basis for departure only if it speaks to the culpability of the defendant or the severity of the offense, or if it is otherwise related to some other congressionally-authorized legitimate sentencing concern.

Pet. App. 60a, quoting *United States* v. *Crippen*, 961 F.2d 882, 884 (9th Cir.), cert. denied, 113 S. Ct. 438 (1992) (emphasis deleted).

a. Applying that analysis, the court of appeals held that the district court erred in awarding the three-level departure based on a combination of three factors. Pet. App. 58a-69a. The court did not disagree with the district court's conclusion that several factors can sometimes be combined to form a basis for departure, even though no factor alone would warrant it. The court held, however, that each of the factors must still be examined to determine whether considering it as part of a mix is consistent with the structure and purposes of the Guidelines and the federal sentencing statutes. *Id.* at 58a-59a.

The court of appeals then held that none of the factors relied on by the district court formed a permissible component of a combination departure. The court concluded that the personal and professional consequences stemming from a criminal conviction are not permissible grounds for departure because they are "not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes." Pet. App. 62a. The sentences imposed under the Guidelines, the court explained, were not conceived to be the sole consequence of conviction for criminal offenses; collateral consequences such as job loss and social stigma are ordinary consequences of a criminal conviction. *Ibid.* Any attempt to separate collateral consequences that should serve as a ground for a departure from those that should not, the court noted, "would be boundless in the moral, social, and psychological examinations it required courts to make" and "can only lead to huge disparities," in contravention of "one of the overriding purposes of the Sentencing Guidelines." *Id.* at 63a. That factor

could also be used "consciously or unconsciously" as a way to take into account socio-economic status, "a factor that is *never* a permissible basis for departure." *Id.* at 63a.

The court of appeals held that susceptibility to abuse in prison by virtue of a person's status is also an impermissible factor to consider. Pet. App. 64a-66a. The court explained that such a departure ground is both "subjective and open-ended" and could be applied to numerous groups, such as gang members who may face increased abuse from members of a rival gang, police informants, or child abusers. *Id.* at 65a-66a. Noting that "the number of defendants who might qualify * * * is virtually unlimited," the court concluded that acceptance of that ground for a departure "would subvert the Guidelines' goal of reducing unwarranted disparities in sentencing." *Id.* at 66a.

The court of appeals next held that it was impermissible to consider the fact that petitioners are unlikely to engage in future unlawful conduct. Because the Commission has stated that the lower end of criminal history category I is set for an offender with no risk of recidivism, the court explained, that factor is already taken into account by the Guidelines. Pet. App. 67a-68a.

Finally, the court of appeals concluded that the district court's perception of a "specter of unfairness" arising from the successive state and federal prosecutions is not a permissible departure factor "because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern." Pet. App. 68a-69a. The court added that recognizing such a departure ground would conflict with the court's duty under 18 U.S.C. 3553(a)(2)(A) to impose a sentence that "[r]eflects the seriousness of the offense," and would undermine the Attorney General's determina-

tion that compelling federal interests warranted a second prosecution. *Id.* at 69a.

b. The court of appeals likewise held that the five-level departure for victim misconduct was not justified. The court explained that the district court's findings demonstrated that King's misconduct provoked only petitioners' initial lawful use of force, not their "offense behavior," as required by Guidelines § 5K2.10. By focusing on whether King's misconduct was a but-for cause of the unlawful conduct, rather than on whether that misconduct actually "provoked" the offense behavior, the district court had applied an incorrect legal standard. Pet. App. 70a-71a.

The court of appeals also concluded that the incident's volatility, and the fact that petitioners were justified in using force at its inception, did not remove the case from the "heartland" covered by Guidelines § 2H1.4. The court observed that in deciding whether a particular use of force is reasonable, *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989), expressly requires consideration of the fact that a police officer must often make split-second decisions about the amount of force required. That standard "strongly suggests that provocation by the victim in a situation where an officer must act quickly is typical—not unusual." Pet. App. 73a. The district court's view that such provocation takes a case out of the heartland, the court of appeals concluded, is particularly inapt in a criminal prosecution, in which the government must make the difficult showing that police officers "*willfully* came down on the wrong side of the *Graham* standard." *Ibid.*

4. The panel voted to deny rehearing, and the full court voted to deny the suggestions of rehearing en banc. Pet. App. 80a-81a. Judge Reinhardt, joined by eight other judges, dissented from the denial of rehearing en

banc on the sentencing issues. *Id.* at 81a-93a. The dissent argued that district courts should have considerable discretion to depart and that their decisions should be reviewed under a deferential standard. *Id.* at 88a-90a.

SUMMARY OF ARGUMENT

I. A. Congress enacted the Sentencing Reform Act of 1984 to eliminate what it viewed as intolerable disparities in sentences resulting from the unreviewable discretion exercised by individual district courts. It authorized the Sentencing Commission to establish sentencing ranges for defendants with similar criminal histories and similar offense conduct that would be binding on the courts, and it narrowly limited the circumstances in which courts may depart from those sentencing ranges. To depart downward from the applicable sentencing range, there must be a "mitigating" factor that has not been adequately considered by the Commission. 18 U.S.C. 3553(b). All departures must also be consistent with the purposes of sentencing stated in 18 U.S.C. 3553(a)(2) (retribution, deterrence, incapacitation, and rehabilitation). A crucial element of the federal sentencing scheme, not present in the prior system, is appellate review of sentences to enforce those limitations and to protect against unwarranted disparities arising from the differing sentencing approaches of individual district judges.

B. The language, structure, and purposes of the Sentencing Reform Act show that Congress intended courts of appeals to exercise de novo review over the validity of a ground for departure. The statute requires appellate courts to accept district court findings of fact unless they are clearly erroneous, and to give "due deference to a district court's application of the guidelines to the facts." 18 U.S.C. 3742(e). The logical inference is that Congress

intended reviewing courts to undertake de novo review of a district court determination that a factor is a legally permissible ground on which to depart. A de novo standard is consistent with the traditional plenary review of legal issues. The question whether the Commission has adequately considered a factor is essentially a matter of Guidelines interpretation, and the question whether a factor is consistent with the statutory sentencing goals is essentially a matter of explicating the statute. Both questions are therefore legal ones fit for a de novo standard.

The legislative history of the Sentencing Reform Act also supports de novo review. It shows that Congress contemplated that appellate courts would develop case law on departure grounds and that they would review legal issues de novo. That standard has its usual law-clarifying benefits, because departure decisions present recurring issues, and plenary review fosters a consistent and coherent body of departure law. De novo review is also essential to achieve Congress's goal of preventing unwarranted disparities in sentencing. Departures are potentially a huge loophole in Congress's sentencing scheme. Failure to apply close appellate oversight could lead to a return of disparate sentencing practices that Congress sought to replace.

II. The district court in this case relied on a variety of factors to depart downward by a total of eight levels from the Guidelines range. None of those factors constituted a legally permissible basis for departure.

A. All of the bases for the district court's three-level departure are impermissible ones. Job loss and its attendant consequences are in the heartland of excessive force cases. Moreover, because there is no judicially manageable standard for deciding which collateral consequences of conviction warrant a departure, acceptance of that

general ground would invite, and inevitably produce, unwarranted disparities in sentencing. It would also lead to effects that are indistinguishable from sentencing based on socio-economic status, a prohibited factor under the Act and Guidelines.

Unusual susceptibility to abuse in prison is also an impermissible factor. The degree of a defendant's vulnerability is entirely subjective, and the number of potential defendants who could claim unusual vulnerability is virtually unlimited. Permitting a downward departure on that ground would thus lead to unwarranted disparities. The Bureau of Prisons has a constitutional responsibility to protect persons it knows are unusually vulnerable to assault, and courts may not assume that it will not be fulfilled.

Nor is the likelihood that a defendant will not commit crime in the future a valid departure consideration; that factor is already taken into account in the defendant's criminal history category. While the Commission has authorized a departure when a defendant's criminal history category overstates the likelihood of recidivism, it has prohibited a departure on that basis below the bottom of criminal history category I.

Finally, this Court's double jeopardy decisions conclusively establish that there is no legally cognizable unfairness from successive state and federal prosecutions for the same conduct. Acceptance of successive prosecution as a departure ground would undermine the Attorney General's determination that compelling federal interests justified the prosecution in this case.

Because none of the departure grounds discussed above is permissible, a departure based on all of those grounds combined is also impermissible.

B. The district court's five-level departure for victim misconduct was also unwarranted. Under Guidelines

§ 5K2.10, victim misconduct must be a motivating factor for the offense behavior, not merely a but-for cause of it. The district court's findings, however, establish only that King's conduct provoked the incident itself and the initial lawful use of force; King's conduct did not provoke the offense behavior as required by Section 5K2.10. The district court's application of Section 5K2.10 therefore rests on an erroneous construction of the Guidelines.

Further, ordinary victim misconduct lies in the heartland of excessive force cases. The legal standard for determining whether an official used constitutionally excessive force is framed to account for victim misconduct. The requirement in a criminal case that the government prove that a defendant has acted willfully in using unreasonable force reinforces the conclusion that ordinary victim misconduct is not a mitigating factor.

ARGUMENT

I. A DISTRICT COURT'S DETERMINATION THAT A PARTICULAR FACTOR PROVIDES A LEGALLY PERMISSIBLE BASIS FOR DEPARTURE IS SUBJECT TO DE NOVO APPELLATE REVIEW

In the federal system, sentencing is governed by the Sentencing Reform Act of 1984, which requires a district court to impose a sentence within the applicable range under the Sentencing Guidelines unless there exists an aggravating or mitigating circumstance of a kind or to a degree that the Sentencing Commission did not adequately consider. Even if the Commission has not adequately considered a factor, a downward departure is permissible only when it is a "mitigating" factor, consistent with the purposes of sentencing identified in 18 U.S.C. 3553(a)(2), *i.e.*, retribution, deterrence, incapacitation, and rehabilitation. The question whether a particu-

lar departure ground satisfies those statutory requirements is subject to de novo appellate review.

A. Congress Intended Appellate Review To Be A Principal Check Against Unjustified Departures

In order to resolve the question presented in this case, it is necessary to understand the background and structure of the Sentencing Reform Act of 1984 and the Sentencing Commission's Guidelines. The Sentencing Reform Act responded to the widespread perception that federal sentences exhibited "shameful disparity." S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983); see *Mistretta* v. *United States*, 488 U.S. 361, 365-366 (1989). As the Senate Judiciary Committee explained, the disparity could be traced directly to the "unfettered discretion" the law conferred on district judges. S. Rep. No. 225 at 38. Without sentencing standards or review procedures, "each judge [was] left to apply his own notions of the purposes of sentencing." *Ibid.* The consequence was that "every day federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." *Ibid.* Congress's solution was the Sentencing Reform Act, which created "sweeping reforms" in the federal sentencing process. *Mistretta*, 488 U.S. at 366.

The statutory framework for departures: The Act created the United States Sentencing Commission, empowered the Commission to devise guidelines for sentencing, and made the Commission's guidelines binding on the courts. *Mistretta*, 488 U.S. at 361. Acting under that statutory authority, the Commission has issued guidelines that set sentencing ranges on the basis of the offender's conduct and criminal history category. See, *e.g.*, U.S.

Sentencing Commission, *Guidelines Manual* (Nov. 1994); *Nichols* v. *United States*, 114 S. Ct. 1921, 1924 n.3 (1994).

The Sentencing Reform Act carefully limits the authority of courts to depart from the sentencing ranges prescribed by the Commission's guidelines. A court "shall impose a sentence of the kind, and within the range" prescribed by the Guidelines "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). In determining whether the Commission adequately considered a circumstance, "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. 3553(b). The Senate Committee Report reveals an intention that "most cases will result in sentences within the guideline range." S. Rep. No. 225 at 52. While the departure standard left some "flexibility" in sentencing where the guidelines did not address a situation, *id.* at 78, Congress rejected an amendment that would have given wide-open discretion to district courts to depart "whenever a judge determined that the characteristics of the offender or the circumstances of the offense warranted deviation," regardless of the consideration of that factor by the Commission. *Id.* at 79.[3]

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[3] In the course of debate on clarifying amendments to Section 3553(b), see Pub. L. No. 100-182, § 3, 101 Stat. 1266 (1987), several Senators emphasized that departures are reserved for a "rare and particularly unusual" case. 133 Cong. Rec. 33,109 (1987) (statement of Sen. Hatch). If the departure standard did not strictly limit departures to exceptional cases, "there [was] a danger that trial judges [would] be able to depart from the guidelines too freely, and such unwarranted

The Guidelines' treatment of departures: In keeping with Congress's intent, the Commission sought to narrow the circumstances in which a departure would be appropriate. The Guidelines, "offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practices." Sentencing Guidelines Ch. 1, Pt. A (Intro.) 4(b) (policy statement). In addition, the Commission issued policy statements indicating that some factors cannot be grounds for any sentencing determination: *e.g.* race, sex, national origin, creed, religion, and socio-economic status (§ 5H1.10). It also stated that certain factors "are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range" (Sentencing Guidelines Ch. 5, Pt. H, Introductory commentary): *e.g.* age (§ 5H1.1); education and vocational skills (§ 5H1.2); physical condition or appearance (§ 5H1.4); employment record (§ 5H1.5); family responsibilities (§ 5H1.6); and prior good works (§ 5H1.11). And it identified certain factors that may warrant a departure: *e.g.* victim conduct (§ 5K2.10); coercion and duress (§ 5K2.12); and diminished capacity (§ 5K2.13).

More generally, the Commission stated that each of the offense guidelines takes into account all conduct that occurs in its "heartland." Sentencing Guidelines Ch. 1, Pt. A (Intro.) 4(b) (policy statement). The Commission intended for courts "to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." *Ibid.* A departure is permissible only "[w]hen a court finds an atypical

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departures would undermine the core function of the guidelines, which is to reduce disparity." *Ibid.*; accord *id.* at 33,108-33,109 (joint statement of Senators Biden, Thurmond, Kennedy, and Hatch).

case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm." *Ibid.* The Commission did "not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." *Ibid.* But because the Commission sought to take into account the factors that experience had shown made a significant difference in sentencing, it anticipated that such departures would be "highly infrequent." *Ibid.*

District court departure decisions: In order for a case to be a candidate for departure, a district court must determine that the Commission has not given adequate consideration to a particular aggravating or mitigating circumstance. If the court finds that such a factor takes a case outside of a guideline's "heartland," it "may then go on to consider, in light of the sentencing system's purposes, *see* 18 U.S.C. § 3553(a), (and the Guidelines themselves) whether or not the 'unusual' features of the case justify departure." *United States* v. *Rivera*, 994 F.2d 942, 947 (1st Cir. 1993) (Breyer, C.J.); see also *id.* at 949. Section 3553(a) provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." Paragraph (2), in turn, provides that the sentence imposed must (A) "reflect the seriousness of the offense, * * * promote respect for the law, and provide just punishment for the offense," (B) "afford adequate deterrence to criminal conduct," (C) "protect the public from further crimes of the defendant," and (D) "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. 3553(a)(2). That provision was intended to assure for the first time that the federal criminal justice system would

adhere to a consistent sentencing philosophy. S. Rep. No. 225 at 59-60; see also *id.* at 75-76. Section 3553(a) further directs the court "to consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). That subsection "requires judges to avoid unwarranted disparity in applying the guidelines and particularly in deciding when it is desirable to sentence outside the guidelines." S. Rep. No. 225 at 78.

Appellate review: A "critical" component of preventing unwarranted sentencing disparities is the provision for appellate review of departures, at the behest of both the defendant and the government. S. Rep. No. 225 at 151. Under 18 U.S.C. 3742(a) and (b), either the defendant or the government may appeal a sentence that "was imposed as a result of an incorrect application of the sentencing guidelines." A district court's reliance on an invalid departure ground in imposing a sentence constitutes an "incorrect application" of the sentencing guidelines within the meaning of those provisions. *Williams* v. *United States*, 503 U.S. 193, 200 (1992). A sentence must also be set aside if it is "outside the guideline range, and is unreasonable." 18 U.S.C. 3742(e)(3), (f)(2); *Williams*, 503 U.S. at 202.

While a discretionary decision by a district court not to depart from the Guidelines is not appealable, the Act permits the government to appeal a downward departure, and it permits a defendant to appeal an upward one. 18 U.S.C. 3742(a) and (b). That appellate review structure was designed by Congress as part of "an effort to achieve greater uniformity" in sentencing, S. Rep. No. 225 at 65, and "to reduce materially any remaining unwarranted disparity" after application of the guide-

lines, *id.* at 86.[4] Government appeals of departure decisions were of particular importance. As the Senate Report explains, "it is essential that there be a mechanism to appeal on behalf of the public those sentences which fall below the applicable guidelines." *Id.* at 65. The Report further explains that "[b]ecause sentencing judges retain the flexibility of sentencing outside the guidelines, it is inevitable that some of the sentences outside the guidelines will appear to be too severe or too lenient. Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." *Id.* at 151. By providing for appeals by both parties, the Act laid the groundwork for "the development of a principled and balanced body of appellate case law" on departures. *Id.* at 151.[5]

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[4] Before the Sentencing Reform Act, this Court had noted the strong and vocal criticism that the federal sentencing system invited arbitrary decisions, and, in rejecting a double jeopardy challenge to the government's appeal of a sentence, observed that "[a]ppellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing." *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980). The Senate Report quoted this language in explaining the validity of the review procedures it prescribed. S. Rep. No. 225 at 153.

[5] The case law was, in turn, expected to "assist the Sentencing Commission in refining the sentencing guidelines as the need arises. For example, if the courts found that a particular offense or offender characteristic that was not considered, or adequately reflected, in formulation of the guidelines was an appropriate reason for imposing sentences that differed from those recommended in the guidelines, the Sentencing Commission might wish to consider amending the guidelines to reflect the factor." S. Rep. No. 225 at 151.

B. Congress Intended Appellate Courts To Exercise De Novo Review Of The Validity Of A Departure Ground

The text, structure, and design of the Sentencing Reform Act uniformly point to the application of a de novo, rather than deferential, standard of review of the question whether a departure ground relied on by a district court is a permissible one, *i.e.* whether it was adequately considered by the Commission within the meaning of 18 U.S.C. 3553(b) and is an "aggravating or mitigating" factor consistent with the purposes of sentencing in 18 U.S.C. 3553(a).

1. *Statutory text.* The text of the appellate review provisions strongly supports de novo review. In 1988, Congress amended the Act to provide that in appeals of Guidelines rulings:

> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

18 U.S.C. 3742(e). Congress thus expressly required the usual deference to a district court's findings of fact, and provided for "due deference" to its application of the guidelines to the facts. Congress's express provision for a measure of deference on those two appellate issues strongly implies that it envisioned that courts would conduct de novo review on the threshold legal question whether the ground for departure relied on by the district court is a permissible one.

De novo review of the validity of a particular departure ground accords with the general rule that legal

questions are reviewed de novo. See *Salve Regina College* v. *Russell*, 499 U.S. 225, 231-233 (1991); *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988); see *First Options of Chicago, Inc.* v. *Kaplan*, 115 S. Ct. 1920, 1926 (1995). As the Court has noted, "[i]ndependent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration." *Salve Regina*, 499 U.S. at 231. The issues of whether a departure ground was adequately considered by the Commission and whether it is consistent with the requirements of Section 3553(a) are both legal in character.

In determining whether the Commission has adequately considered a factor, a court must decide whether the Commission has categorized the factor as a prohibited ground for departure, a generally inappropriate basis for departure, or a generally permissible one. It must also decide whether the factor has already been adequately taken into account by the Commission in framing the "heartland" of the applicable offense guidelines. In resolving those issues, a court may not consider evidentiary proof. By statute, a court must resolve those issues "only" by considering "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. 3553(b). Determining whether the Commission has adequately considered a factor is therefore essentially a matter of interpreting the Commission's guidelines. For that reason, it is an issue of law, subject to de novo review. As Justice Souter has explained, because the question of adequate consideration "goes essentially to the Commission's intentions," and turns "not on an evidentiary record," but "on documented administrative history and commentary," it is "an issue of law subject to customary appellate review."

See *Burns* v. *United States*, 501 U.S. 129, 151-152 & n.6 (1991) (Souter, J., dissenting).[6]

For similar reasons, the question whether a departure ground is consistent with the purposes of sentencing described in 18 U.S.C. 3553(a) is also an issue of law. As the text of Section 3553(a) makes clear, compliance with its requirements is an independent statutory duty. See 18 U.S.C. 3553(a) ("court *shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection") (emphasis added). Thus, even when a factor has not been taken into account by the Commission, a departure is permissible only if it promotes the four stated purposes of sentencing (retribution, deterrence, incapacitation, and rehabilitation, 18 U.S.C. 3553(a)), and would not lead to unwarranted sentencing disparities between defendants with similar records found guilty of similar conduct (18 U.S.C. 3553(a)(6)).

The purposes of sentencing set forth in Section 3553(a) also shed light on whether a factor is "aggravating" or "mitigating" and whether a circumstance "should result" in a departure within the meaning of Section 3553(b). See *United States* v. *Clark*, 8 F.3d 839, 842 (D.C. Cir. 1993) ("To qualify as 'mitigating,' a circumstance must be linked to one of the stated purposes of sentencing, *i.e.*, just punishment, adequate deterrence, public protection, or rehabilitation"). *United States* v. *Crippen*, 961 F.2d 882, 884 (9th Cir.), cert. denied, 113 S. Ct. 438 (1992);

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[6] In *Burns*, the Court held that a district court that intends to depart from the Guidelines range based on a factor not previously identified by the presentence report must give reasonable notice to the parties of that intention. 501 U.S. at 138-139. The majority did not reach or address the issue discussed by Justice Souter of how a court should determine whether the Commission took adequate account of a particular factor in fashioning the Guidelines.

United States v. *Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (to decide whether a circumstance not taken into account by the Commission should result in a departure "a court should look to the sentencing system's purposes"); see also *United States* v. *Mogel*, 956 F.2d 1555, 1563 (11th Cir.), ("[a]ll departures must be firmly grounded in one or more of the relevant penological goals underlying the Guidelines") cert. denied, 113 S. Ct. 167 (1992). Indeed, the core meaning of "mitigating" is linked to purposes of sentencing that primarily relate to the defendant's culpability or the seriousness of the offense. See *Black's Law Dictionary*, 1002 (6th ed. 1990) (defining "mitigating circumstances" as "[s]uch as do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability").[7]

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[7] As the court of appeals in this case concluded (Pet. App. 60a-61a & n.33), the question whether a departure ground is consistent with Section 3553(a) will often depend on whether it relates to the "culpability of the defendant or the severity of the offense." All of the departure factors encouraged by the Commission fall into one of those two categories (*e.g.*, death, physical injury, and unlawful restraint bear on the seriousness of the offense, while lesser harms, coercion, and diminished capacity bear on the culpability of the defendant). The Commission has also expressly discouraged departures based on certain factors that do not relate to the culpability of the defendant or the seriousness of the offense (*e.g.*, family circumstances, physical infirmity). That does not mean that factors that are unrelated to the defendant's culpability or the seriousness of the offense can never constitute grounds for departure. See Pet. App. 61a n.33. It does mean, however, that such factors should be carefully scrutinized to insure that they promote one of the purposes of sentencing expressed in the Sentencing Reform Act and would not lead to unwarranted sentencing disparities.

The application of the purposes listed in Section 3553(a), both as an independent statutory requirement and as the source for interpreting the terms "mitigating" and "should result" in Section 3553(b), requires courts to measure proposed departure grounds against legal benchmarks that govern the imposition of sentences.[8] Departures from the Guidelines therefore involve issues of law that are subject to a plenary standard of appellate review. *United States* v. *Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991) (en banc).

2. *Legislative history.* The legislative history of the Sentencing Reform Act also supports the conclusion that the legal validity of a departure ground is subject to de novo review. The Senate Report states that "[a]ppellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines. This in turn will assist the Sentencing Commission in refining the sentencing guidelines as the need arises." S. Rep. No. 225 at 151. De novo review is best suited to those tasks.

The Sentencing Reform Act originally contained no provision defining the applicable standards for appellate review. In 1988, Congress added to 18 U.S.C. 3742(e) the provision requiring courts of appeals to give "due deference" in reviewing the application of the guidelines to the facts. 102 Stat. 4417. The House section-by section analysis explains that when a party appeals on the

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[8] The reviewing court must also consider the purposes of sentencing in evaluating the reasonableness of a departure under 18 U.S.C. 3742(e)(3) (requiring court of appeals to determine whether a sentence is "outside the applicable guideline range, and is unreasonable," with regard for (A) "the factors to be considered in imposing a sentence," as set forth in 18 U.S.C. 3553(a), and (B) the district court's stated reasons for the sentence).

ground that the district court has incorrectly applied the guidelines, findings of fact are reviewed for clear error, but "[t]he court of appeals will scrutinize more closely a district court determination of a legal question, applying a *de novo* standard." 134 Cong. Rec. 33,303 (1988). The section-by-section analysis further explains that the new due deference standard was intended to give appellate courts "flexibility" in reviewing the application of the guidelines to the facts. If the particular determination more closely resembles a factual issue, something approaching clear error review would apply. On the other hand, if the issue more closely resembles a legal issue, something approaching de novo review would apply. *Id.* at 33,303. Those statements reinforce the conclusion that de novo review is appropriate for the legal question of whether a departure ground is permissible in the first place.

3. *Institutional advantages.* De novo review of departure grounds also "produce[s] the normal law-clarifying benefits that come from an appellate decision on a question of law." *Pierce*, 487 U.S. at 561; see *Thompson* v. *Keohane*, No. 94-6615, (Nov. 29, 1995), slip op. 16 ("the law declaration aspect of independent review potentially may * * * unify precedent and stabilize the law"; holding that "in custody" determinations for purposes of *Miranda* are subject to independent, rather than deferential, federal review in habeas corpus proceedings). The body of decisional law in the courts of appeals illustrates the recurring issues faced in the departure context and the courts of appeals' distillation of general legal principles.

In examining whether particular departure factors accord with the purposes of sentencing listed in 18 U.S.C. 3553(a), courts of appeals have repeatedly resolved legal issues that turn on identifiable and recurrent principles.

For example, courts have often encountered claims that various forms of alleged government misconduct constituted a valid basis for a downward departure. That claim has universally been rejected, on the basis that, while the Commission had not considered such an unusual circumstance, recognizing that ground for departure would "run[] counter to a primary purpose of the sentencing system, which is to deter criminal conduct." See *United States* v. *Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (fact that INS gave defendant incorrect information about the criminal penalty he would face upon illegal reentry did not justify a downward departure); accord *United States* v. *Gomez-Villa*, 59 F.3d 1199, 1202 (11th Cir. 1995), petition for cert. pending, No. 95-6028; *United States* v. *Ullyses-Salazar*, 28 F.3d 932, 938 (9th Cir. 1994), cert. denied, 115 S. Ct. 1367 (1995); *United States* v. *Agubata*, 60 F.3d 1081, 1084 (4th Cir. 1995), petition for cert. pending, No. 95-6524; *United States* v. *Cruz-Flores*, 56 F.3d 461, 464 (2d Cir. 1995); see also *United States* v. *Pacheco-Osuna*, 23 F.3d 269, 272 (9th Cir. 1994) (Fourth Amendment violation); *United States* v. *Williams*, 978 F.2d 1133, 1136 (9th Cir.) (perjury before a grand jury), cert. denied, 113 S. Ct. 1606 (1992); *United States* v. *Valencia-Lucena*, 925 F.2d 506, 515 (1st Cir. 1991) (same as *Williams*).

The determination of whether a particular factor is within the "heartland" likewise benefits from de novo review. For example, in *United States* v. *Rivera*, 994 F.2d 942, 945 (1st Cir. 1993), the district court sentenced the defendant to probation rather than to prison, as the Guidelines dictated, in order to allow him to continue working and thereby make restitution. The First Circuit, "deciding the question as a pure matter of law," reversed. It held that "the embezzlement guidelines encompass, within their 'heartland,' embezzlement accom-

panied by *normal* restitution needs and practicalities," and thus that such needs cannot justify a downward departure. *Id.* at 955. The court explained "that the embezzlement guidelines are written for ordinary cases of embezzlement, that restitution is called for in many such cases, and that prison terms often make restitution somewhat more difficult to achieve." *Ibid.* The court also noted that recognizing such a departure ground would run contrary to the Commission's intent to equalize punishments for white collar and blue collar crimes. *Ibid.* That resolution is consistent with the holdings of other courts. See *id.* at 956 (citing *United States* v. *Harpst*, 949 F.2d 860, 863 (6th Cir. 1991) and *United States* v. *Bolden*, 889 F.2d 1336, 1340 (4th Cir. 1989)). Other heartland issues have been similarly resolved through application of de novo review. See, *e.g.*, *United States* v. *Rutana*, 932 F.2d 1155, 1158 (6th Cir.) (fact that the imprisonment of an industrial polluter would work a hardship on the defendant's employees and their families did not take the case outside the heartland of the industrial pollution guidelines), cert. denied, 502 U.S. 907 (1991).

The application of de novo review has enabled courts of appeals to fulfill the expectation voiced in the legislative history that sentencing appeals would promote "the development of a principled and balanced body of appellate case law." S. Rep. No. 225 at 151. Courts have ruled that the following are not permissible grounds for a departure: the possibility of deportation following a sentence, *United States* v. *Restrepo*, 999 F.2d 640, 646-647 (2d Cir.), cert. denied, 114 S. Ct. 405 (1993); the loss of good time credits resulting from the offense conduct, *United States* v. *Newby*, 11 F.3d 1143, 1148-1149 (3d Cir. 1993), cert. denied, 114 S. Ct. 1841 (1994); equalizing a sentence with that of a co-defendant, *United States* v.

Wogan, 938 F.2d 1446, 1448 (1st Cir.), cert. denied, 502 U.S. 969 (1991); the shooting of the defendant by a third-party, *United States* v. *Mason*, 966 F.2d 1488, 1494 (D.C. Cir.), cert. denied, 113 S. Ct. 829 (1992); the imprisonment of a spouse, *United States* v. *Pozzy*, 902 F.2d 133, 139 (1st Cir.), cert. denied, 498 U.S. 943 (1990); the absence of any need to incarcerate, *United States* v. *Brewer*, 899 F.2d 503, 509-510 (6th Cir.), cert. denied, 498 U.S. 844 (1990); a jury recommendation for leniency, *United States* v. *Mickens*, 926 F.2d 1323, 1333 (2d Cir.), cert. denied, 502 U.S. 1060 (1991); a violation of state speedy trial requirements leading to federal prosecution for the same conduct, *United States* v. *Deitz*, 991 F.2d 443, 445-446 (8th Cir. 1993); the community perception that the sentence is excessive, *United States* v. *Hadaway*, 998 F.2d 917, 920-921 (11th Cir. 1993); the alleged weakness of the government's case, *United States* v. *Brooks*, 966 F.2d at 1505 (D.C. Cir. 1992); and the prosecutor's discretion to bring a case in federal rather than local court, *United States* v. *Clark*, 8 F.3d 839, 842-843 (D.C. Cir. 1993). Those decisions show that de novo review furthers the development of a coherent body of law concerning when it is legally permissible to depart from the Guidelines.

4. *Statutory purposes.* De novo review is also essential to serve Congress's goal of eliminating unwarranted disparity in sentencing. The disparities that Congress sought to remedy through the Sentencing Reform Act stemmed principally from the widely varying sentencing philosophies of district judges who exercised discretion in sentencing without any check in law or through appellate review. The review of departures under a deferential standard would invite a return to such individualized sentencing decisions.

Disparity in sentencing is particularly problematic when it results from the different interpretations of the law held by individual district judges. It is one thing to acknowledge that a recognized departure ground may be applied to particular facts in varying ways from courtroom to courtroom. But it is another thing altogether to delegate to district courts the legal power to make different decisions about what constitutes a permissible departure ground. The application of deferential, rather than de novo, review would yield precisely that result. Inherent in the concept of deference is that two different judges looking at the same factor can reach opposite conclusions about whether it is a legally permissible basis for departure. Absent de novo review, in many circumstances, each of those contrary conclusions would have to be affirmed.

That consequence cannot be reconciled with the purposes of the Sentencing Reform Act. Government misconduct either is or is not a basis for departure; ordinary restitution needs either are or are not a permissible basis for departure in an embezzlement case; the loss of jobs suffered by employees either is or is not a valid basis for departure in an industrial pollution case. Under the system created by Congress, they cannot be both. The same is true of the departure grounds involved in this case. Congress did not intend to create a sentencing system in which job loss, unusual susceptibility to abuse in prison, unlikelihood of recidivism, dual prosecution, and ordinary provocation in an excessive force case would be legally permissible grounds for a departure in some courtrooms, but not others. De novo review is necessary to prevent that form of disparity from becoming routine in the federal sentencing system.

Of course, through its power to revise the guidelines, the Commission plays a central role in ensuring even-

handed sentencing determinations. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991); 28 U.S.C. 994(*o*). But the Commission's function is complemented, not undercut, by plenary appellate review of the permissibility of particular grounds for departure. While the Commission monitors the work product of both district courts and courts of appeals, the sheer volume of district court departure decisions, and the absence of a complete legal analysis in many of those decisions, greatly diminishes the utility of those results as raw material for the Commission to analyze. In contrast, the Commission may readily consult court of appeals decisions, benefit from the detailed and thorough application of the law to the facts in written opinions, and revise the Guidelines in response to factors that emerge as warranting clarification on a nationwide level. The Commission in fact pays particular attention to the work product of the appellate courts, including by systematically tracking grounds for departure decisions.[9] Congress's goal of eliminating unwarranted disparities is therefore best realized by de novo review of the legal validity of a departure ground.

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[9] See U.S. Sentencing Commission, *Annual Report* 13-19 (1994) (tables and discussion of approved and disapproved departure factors at the appellate level). The Commission's review of appellate court decisions is, for many reasons, a more searching and complex endeavor than its tracking of district court decisions. See *id.* at 133, 135 (describing the "collaborative effort of the Commission's legal, monitoring, and policy analysis staffs" in reviewing all published and unpublished appellate decisions involving sentencing issues); *cf. id.* at 82 & n.1 (noting that, exclusive of downward departures for substantial assistance, 29,971 district court sentencing determinations were reported to the Commission, 2,932 of which involved downward departures; providing a summary table of major grounds cited).

C. The Arguments Against De Novo Review Are Unsound

Petitioners offer four arguments in favor of deferential review: the intention of the Sentencing Reform Act to leave some discretion in the hands of sentencing judges; the historic tradition in favor of sentencing discretion; the supposed superior perspective of district courts on departure decisions; and the resistance of departure decisions to useful legal generalizations. Koon Br. 22-37; see Powell Br. 33-36. Those arguments do not justify deferential review, and in many respects are at odds with the central purposes and provisions of the Act.

Congress did leave district courts with some sentencing discretion, and it did instruct appellate courts to give "due deference" to a district court's application of the guidelines to the facts. See 18 U.S.C. 3742(e). But it does not follow that Congress also intended to give district courts deference in deciding whether a departure ground is legally permissible. Koon Br. 22-33. As we have explained, see pp. 16-21, *supra*, the central aim of the Sentencing Reform Act was to cabin sentencing discretion in order to eliminate unwarranted disparities, and appellate review was instituted as a principal means to attain that goal.

Likewise, the long history of appellate court deference to district court sentencing decisions, Koon Br. 33-35, does not counsel in favor of a highly deferential standard of review for departure decisions. Koon relies (Br. 34-25) on this Court's statements in *Williams* v. *United States*, 503 U.S. 193, 205 (1992), that the Act "did not alter a court of appeals' traditional deference to a district court's exercise of sentencing discretion," and "[t]he selection of the appropriate sentence from within the guideline range, as well as the decision to depart from

the range in certain circumstances, are decisions that are left solely to the sentencing court." Those statements are simply a shorthand way of acknowledging that the decision to depart is discretionary when there is a permissible ground for departure; only then is a departure decision "solely" the district court's to make. 503 U.S. at 205. As *Williams* itself made clear, the district court may be reversed as a matter of law for an "incorrect application of the Guidelines," *i.e.* when it "depart[s] from the applicable sentencing ranged based on a factor that the Commission has already fully considered in establishing the guideline range." *Id.* at 200.

Selecting the appropriate standard of review often depends on which judicial actor is institutionally better suited to make the determination in question. See *First Options*, 115 S. Ct. at 1926. Contrary to Koon's contention, Br. 35-36, however, the question whether a ground for departure is permissible does not turn on the credibility of witnesses or a judge's feel for the case, factors that favor deferential review. Rather, answering that question turns primarily on interpretation of the Guidelines and explication of Section 3553(a). Appellate courts are therefore better positioned to decide whether a departure ground is legally permissible.

Koon errs in contending (Br. 36-37) that departure decisions are so fact-specific as to resist meaningful generalization, and that de novo review is therefore inappropriate. In contrast to the need for district court "supervision of litigation" on fact-bound issues, which supported abuse-of-discretion review in *Pierce*, 487 U.S. at 558 n.1, and *Cooter & Gell* v. *Hartmax Corp.*, 496 U.S. 384, 401-405 (1990), departures from the Guidelines *do* tend to fall into categories involving recurring questions.

See pp. 27-30, *supra*. Reviewing those issues de novo furthers the development of a coherent body of law.

Although Koon has framed the question before this Court (Koon Br. (i)) as a choice between de novo review or "the deferential standard set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993)," the level of deference proposed by Koon appears to go far beyond the approach outlined in *Rivera*. In *Rivera*, the court of appeals recognized that "plenary review is appropriate where the question on review is simply whether or not the allegedly special circumstances (i.e., the reasons for departure) are of the 'kind' that the Guidelines, in principle, permit the district court to consider at all." 994 F.2d at 951. The court also indicated that plenary review is appropriate when the issue is the "quintessentially legal" one of interpreting the language of a guideline, in light of its underlying purpose, to delineate its "heartland." *Ibid*. *Rivera* went on to hold only that review should be deferential, rather than plenary, when a district court makes a determination "of whether (and the extent to which) given circumstances make a case 'unusual' or 'not ordinary.'" *Id*. at 952.

The question whether a court of appeals should defer to a district court's determinations of "unusualness" for purposes of departure is not presented by the facts of this case, because the grounds cited by the district court are invalid as a matter of law.[10] Nevertheless, in our view,

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[10] Koon argues (Br. 27) that the only gateway that a permissible departure must pass through is the Sentencing Guidelines themselves (*i.e.*, that any factor that takes a case out of the "heartland" and is not prohibited by the Guidelines may form a permissible basis for departure). Some language in *Rivera* supports that analysis (see 994 F.2d at 947), although the First Circuit itself has not read *Rivera* to bar de novo review of departure factors for consistency with the statute. See *United States* v. *Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (conducting

determinations on issues of recurring importance, such as whether sole custody of young children constitutes unusual family circumstances, are best reviewed de novo. Whatever comparative advantages the district court may have in its "'feel' for the unique circumstances of the particular case before it" and in its familiarity with "ordinary" Guidelines cases, *Rivera*, 994 F.2d at 951, those advantages are more than offset by the broad perspective acquired by the courts of appeals over time and their ability to harmonize and reconcile results in different courtrooms throughout the circuit or nation. Exercising de novo review, the courts of appeals may resolve such issues "with a view to identifying recurrent patterns, and advancing uniform outcomes. If [courts] cannot supply a 'definite rule,' they nonetheless can reduce the area of uncertainty." *Thompson* v. *Keohane*, slip op. 13-14 n.13.

II. THE DISTRICT COURT'S GROUNDS FOR DEPARTURE WERE LEGALLY INVALID

Each of the factors that the district court invoked to justify its departure below the Guidelines range rested on considerations that either were adequately taken into

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plenary review and invalidating factor as inconsistent with statutory purposes, even though the factor was not considered by the Commission). To the extent that *Rivera* does suggest that departures need not be tested against the statute, we respectfully disagree. As the decisions of the courts of appeals indicate, see pp. 27-30, *supra*, not every "unusual" factor left out of the Guidelines satisfies the Sentencing Reform Act's requirements. And the Guidelines themselves indicate that a circumstance that is normally irrelevant to departure may become relevant if it "is present to an unusual degree and distinguishes the case from the 'heartland' of cases covered by the guidelines *in a way that is important to the statutory purposes of sentencing*." Guidelines § 5K2.0 (Grounds for Departure) (policy statement).

account by the Sentencing Commission or constitute impermissible grounds for departure in light of the statutory purposes of sentencing. The court of appeals was not required to defer to the district court's determination that those factors were legally valid bases for departure.[11]

A. The District Court Erred Iin Granting A Three-Level Downward Departure Based On Its Combination Of Factors

The district court granted a three level downward departure based on a combination of: (1) additional "punishment" and potential abuse in prison; (2) the absence of a need for public protection; (3) the perceived unfairness of successive state and federal prosecutions. Pet. App. 120a, 121a, 124a-131a. None of these departure factors is legally valid, either alone or in combination.

1. a. The district court found that, as a result of their convictions, petitioners would lose their jobs, be disqualified from prospective employment in law enforcement, and suffer anguish and disgrace from those deprivations. Pet. App. 126a-128a. That series of consequences is not a permissible ground for a departure. Public officials who abuse their public trust and violate the constitutional rights of citizens in violation of 18 U.S.C. 242 will often lose their jobs and suffer lasting

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[11] Even if petitioner Koon were correct in contending (Br. 18) that the Court should adopt a "deferential, abuse-of-discretion standard" for departure decisions, it would not assist him. Courts of appeals must always review de novo the question whether the district court exercised its discretion on the basis of an erroneous view of the law. *Cooter & Gell*, 496 U.S. at 402, 405. And when a district court departs on the basis of a legally impermissible departure ground, it has necessarily abused its discretion. See *Schlup* v. *Delo*, 115 S. Ct. 851, 870 (1995) (O'Connor, J., concurring).

damage to their careers and their reputations. For police officers convicted of a felony, such consequences are virtually automatic. Those consequences therefore do not take a case out of the "heartland" of Guidelines § 2H1.4, which applies to violations of 18 U.S.C. 242.

More generally, persons convicted of crimes suffer a wide range of consequences in addition to the sentence. Defendants may lose employment, face divorce, become impoverished, lose their homes, suffer public humiliation, lose the respect of their children, and endure innumerable other adversities. Any attempt to separate which of such collateral consequences should serve as a ground for a departure from those that should not "would create a system of sentencing that would be boundless in the moral, social, and psychological examinations it required courts to make." Pet. App. 63a. Unanchored to any objective standard, the end result would ineluctably be unwarranted disparities in sentencing in violation of 18 U.S.C. 3553(a)(6).

In particular, if lawyers, police officers, and others in positions of trust were eligible for shorter sentences than less prominent defendants because they suffer more from a conviction, it would lead, "consciously or unconsciously" (Pet. App. 63a), to sentencing based on socioeconomic status, a factor that is never permissible to consider. See 28 U.S.C. 994(d); Guidelines § 5H1.10. Such a downward departure would also have the effect of reversing the Commission's determination that those who abuse the public trust should receive stiffer sentences than others. Guidelines § 3B1.3 commentary (background); Ch.2, Pt.H, Introductory commentary; § 2H1.4, commentary (background). The court of appeals therefore correctly rejected job loss and its attendant consequences as a valid ground for a departure.

b. The district court's finding (Pet. App. 125a) that petitioners would suffer additional punishment because they are particularly likely to be targets of abuse in prison is likewise an invalid factor in considering a departure. Congress directed the Commission to take into account the "nature" of penal facilities in formulating the Sentencing Guidelines. 28 U.S.C. 994(g). In response, the Commission's policy statements indicate that a defendant's age or physical impairment might justify a departure in extreme cases. See Guidelines §§ 5H1.1; 5H1.4. In contrast, the Guidelines do not provide for a departure on the ground that a defendant may be particularly vulnerable to abuse in prison. It is therefore reasonable to infer that the Commission rejected unusual susceptibility to abuse in prison as a ground for departure. See *United States* v. *Lara*, 905 F.2d 599, 607 (2d Cir. 1990) (Metzner, J., dissenting).

The degree of vulnerability to assault is an entirely "subjective" judgment, and the number of defendants who may qualify for that departure is "virtually unlimited." Defendants in general face varying risks of harassment in prison (*e.g.*, a person with a reputation as an informant, a person convicted of a particularly reviled crime). Permitting downward departures based upon claims of unusual susceptibility to assault would therefore subvert the Guidelines' goal of uniformity in sentencing. See *United States* v. *Gonzalez*, 945 F.2d 525, 527-529 (2d Cir. 1991) (Winter, J. dissenting); see also *United States* v. *Smith*, 27 F.2d 649, 666 (D.C. Cir. 1994) (Sentelle, J., dissenting) (rejecting unusual susceptibility to assault as a basis for downward departure, reasoning that, if such a basis were accepted, someone who is especially safe from assault, such as a boxing champion, would be eligible for an upward departure). The Bureau of Prisons has a constitutional responsibility to protect persons who are

known to be unusually vulnerable. *Farmer* v. *Brennan*, 114 S. Ct. 1970 (1994). A sentencing court cannot assume that the Bureau will shirk its responsibility.

2. In awarding its three-level departure, the district court also relied on its view that petitioners were not likely to engage in future criminal conduct and their incarceration therefore was not necessary to protect the public. Pet. App. 128a-129a. The Guidelines, however, expressly prohibit that method of taking the unlikelihood of recidivism into account. Under the Guidelines, the likelihood that a defendant will commit a crime in the future is reflected in a defendant's criminal history category. See Guidelines Ch. 4, Pt. A, Introductory commentary. Although the Commission has authorized a court to depart downward when the defendant's criminal history category overstates that defendant's potential for recidivism, it has prohibited a departure below the bottom of the range set for criminal history category I: "The lower limit of the range for Criminal History Category I is set for a first time offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate." Guidelines § 4A1.3 (policy statement); see *United States* v. *Farah*, 991 F.2d 1065, 1070 (2d Cir. 1993); *United States* v. *Mogel*, 956 F.2d at 1563.

3. The district court also erred in positing, and then relying on, the "specter of unfairness" in successive state and federal prosecutions for the same conduct. Pet. App. 130a-131a. This Court has repeatedly held that "the Constitution does not prohibit successive prosecutions by different sovereigns based on the same conduct." *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1948 n.22 (1994); see *Heath* v. *Alabama*, 474 U.S. 82

(1985); *Abbate* v. *United States*, 359 U.S. 187, 194 (1959). That holding is grounded in the principle that "[w]hen a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offenses." *Heath*, 474 U.S. at 88. It also reflects the concern that "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Ibid.* There is, therefore, no legally cognizable unfairness in successive state and federal prosecutions, and a district court's contrary view does not make it a "mitigating" factor within the meaning of 18 U.S.C. 3553(b).[12]

That is particularly true because under the so-called *Petite* policy, see *Petite* v. *United States*, 361 U.S. 529 (1960) (per curiam), the Attorney General will generally decline to authorize a second prosecution unless it is justified by "compelling Federal interests." See *United States* v. *Snell*, 592 F.2d 1083, 1087 (9th Cir.), cert. denied, 442 U.S. 944 (1979); U.S. Attorney's Manual 9-2.142. As the court of appeals explained, in this case the Attorney General's authorization of a second prosecution "necessarily reflected the conclusion that the distinct federal interests in protecting the constitutional rights of citizens to be free from unreasonable force at the hands of government had not been adequately

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[12] As the D.C. Circuit has explained: "The Commission wrote guidelines for an existing system of criminal procedure; it almost certainly did not intend that decisions traditionally within the prosecutor's ken, and within constitutional bounds, be counterbalanced by a sentencing court." *United States* v. *Dockery*, 965 F.2d 1112, 1117 (D.C. Cir. 1992); *Clark*, 8 F.3d at 842 ("[a] routine exercise of prosecutorial discretion cannot rise to the level of a 'mitigating circumstance' ").

vindicated in the state court proceeding." Pet. App. 69a. The district court's disagreement with the Attorney General's conclusion cannot form the basis for a downward departure.

Finally, reliance on a specter of unfairness in dual prosecutions is impermissible "because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern." Pet. App. 69a. To the contrary, application of that factor conflicts with the court's duty to impose a sentence that "reflect[s] the seriousness of the offense," 18 U.S.C. 3553(a)(2)(A), because it would depreciate the seriousness of petitioners' crimes to view the federal government's decision to intervene as "unfair." [13]

4. Because none of the three grounds for departure was a permissible one, a departure based on a combination of those three grounds was also impermissible. In an extraordinary case, a unique combination of factors may warrant a departure, even though no one factor alone would. See Guidelines § 5K2.0 (Grounds for Departure) (policy statement), commentary (not foreclosing such a possibility, but stating that such situations would be "extremely rare"); Pet. App. 59a n.31. But a court may not combine three impermissible departure grounds to form one permissible one. In this context, three times

---

[13] Petitioner Koon gains no assistance (Br. 47) from *Witte* v. *United States*, 115 S. Ct. 2199 (1995). In *Witte*, the Court indicated that a district court would have authority to consider a downward departure from the applicable sentencing range if the conduct underlying the offense of conviction had previously been taken into account in sentencing the defendant for a prior offense. *Id.* at 2209. Petitioners, however, have not been convicted twice, or sentenced twice based on the same conduct, and the *state* court acquittal hardly diminishes Koon's "culpability and the severity of the offense" (Br. 46) of which he was convicted in *federal* court.

zero equals zero. Any other view would create a gaping loophole in the Guidelines. Every defendant is unique, and each crime carries with it a constellation of events that single it out from all other crimes. If a district court could permissibly cumulate these factors to explain why a particular criminal defendant deserved a sentence outside the Guidelines, the Guidelines system would rapidly unravel. See *United States* v. *Minicone*, 26 F.3d 297, 301-302 (2d Cir. 1994) (collecting cases), cert. denied, 115 S. Ct. 344 (1994).

B. The District Court Erred In Granting A Downward Departure For Victim Misconduct

Section 5K2.10 (policy statement) of the Guidelines authorizes a district court to reduce a sentence below the guidelines range "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior[.]" For two reasons, this Section does not authorize a downward departure here.

1. First, the district court found that King's unlawful conduct provoked only the initial use of force, not the offense behavior. It found that "by the time [petitioners'] conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger." Pet. App. 123a. The district court nonetheless concluded that Guidelines § 5K2.10 was applicable because, but for King's speeding, petitioners would never have been present at the scene, and but for King's initial wrongful conduct in resisting arrest and attempting to escape, no force would have been necessary, and the incident would not have occurred at all. Pet. App. 122a-123a.

The question whether Guidelines § 5K2.10 permits reliance on but-for causation is one of law, and the court of appeals correctly concluded that it does not. Pet. App. 71a. For that Section to apply, it is not enough that a victim's wrongful conduct sets in motion a series of events that eventually results in unlawful behavior committed for other reasons. Rather, the wrongful conduct must actually "provoke[] the offense behavior," *i.e.*, it must be a significant motivating factor for the use of unlawful force. There was no such finding here.

2. Second, the district court erred in departing on the basis of Guidelines § 5K2.10 because "[o]rdinary" victim misconduct does not fall outside the "heartland" of the excessive force guideline, Guideline § 2H1.4. In formulating the constitutional test for evaluating excessive force claims, this Court has expressly stated that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989). As the court of appeals explained, "[t]he incorporation of this consideration into the basic fabric of the law in this area strongly suggests that provocation by the victim in a situation where an officer must act quickly is typical—not unusual." Pet. App. 73a. Reported cases reinforce the conclusion suggested by *Graham*—victim misconduct occurs in many excessive force cases, and is therefore within the heartland of that offense.[14]

---

[14] See *United States* v. *Reese*, 2 F.3d 870, 874-875 (9th Cir. 1993) (victim fled from police and officer was injured in incident), cert. denied, 114 S. Ct. 928 (1994); *id.* at 876 (victim led police on chase; police car crashed, injuring officer); *United States* v. *Boyland*, 979 F.2d 851

The willfulness requirement in a Section 242 prosecution further undermines any basis for departing downward on the basis of ordinary victim misconduct. To satisfy that element of the offense, the government was required to show that petitioners "*willfully* came down on the wrong side of the *Graham* standard." Pet. App. 73a. However reasonable the initial use of force on King might have been, it did not mitigate petitioners' subsequent willfully unlawful decision to beat him as he lay prone on the ground.

(6th Cir. 1992), cert. denied, 113 S. Ct. 3003 (1993) (Table) (victim led officers on car chase, then ran from officers; when caught, he resisted arrest), cert. denied, 113 S. Ct. 3003 (1993); *United States* v. *Newman*, 982 F.2d 665, 667 (1st Cir. 1992) (victim threw a toilet through cell bars, resisted placement in new cell, and would not stop screaming and yelling), cert. denied, 114 S. Ct. 59 (1993); *United States* v. *Myers*, 972 F.2d 1566, 1569 (11th Cir. 1992) (victim drove under the influence, resisted arrest, injured two officers, and destroyed jail property), *id.* at 1570 (victim yelled obscenities and challenged officers to fight); cert. denied, 113 S. Ct. 1813 (1993); *United States* v. *Messerlain*, 832 F.2d 778, 781-782 (3d Cir. 1987) (victim drove while intoxicated and parked car on highway; after he was arrested, he kicked out window of police car), cert. denied, 485 U.S. 988 (1988); *United States* v. *Bigham*, 812 F.2d 943, 944-945 (5th Cir. 1987) (victims escaped from prison); *United States* v. *Patterson*, 809 F.2d 244, 245 (5th Cir. 1987) (victim refused to obey command to go through intersection, then went through slowly while officer hung onto truck); *United States* v. *Walker*, 785 F.2d 1237, 1238 (5th Cir. 1986) (victim stopped for speeding; after heated exchange, victim struck officer); *United States* v. *DeCoito*, 764 F.2d 690, 692 (9th Cir. 1985) (victim knocked down officer with car and fled; when caught, he resisted arrest); *United States* v. *Fricke*, 684 F.2d 1126, 1127-1128 (5th Cir. 1982) (victim struck officer), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Harrison*, 671 F.2d 1159, 1161 (8th Cir.) (victim leaped at officer), cert. denied, 459 U.S. 847 (1982); *United States* v. *Santos*, 588 F.2d 1300, 1301 (9th Cir.) (victims refused to return to jail cells and engaged in demonstration), cert. denied, 441 U.S. 906 (1979); *United States* v. *Stokes*, 506 F.2d 771, 773 (5th Cir. 1975) (victim threatened officers).

Petitioner Powell (Br. 37-39) contends that the relevant offense guideline is aggravated assault (§ 2A2.2) rather than the Section 242 guideline (§ 2H1.4), and that victim misconduct is outside the heartland of the range of cases included in the aggravated assault Guideline. But petitioners were convicted of willfully depriving or permitting others to deprive King of his constitutional rights, not of aggravated assault. Pet. App. 4a. Thus, the calculation of their sentences began with Guidelines § 2H1.4, which prescribes a base offense level of the higher of ten, or six plus the offense level applicable to the underlying offense. The Commission has explained that the addition of two levels "reflects the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights," and that four more levels are added where the defendant is a public official "to reflect the likely damage to public confidence in the integrity and fairness of government, and the added likely force of the threat because of the official's involvement." U.S.S.G. Ch.2, Pt.H, Introductory commentary; see § 2H1.4, comment. (background). By so structuring the Guidelines, the Commission made it clear that a civil rights violation is both a different and a more serious offense than the underlying conduct by itself. The heartland, then, must be defined in terms of the civil rights offense, not the underlying offense of aggravated assault.

The district court concluded that a downward departure was necessary to distinguish cases in which an official's use of force is unlawful from the beginning from those in which an official's initial use of force is lawful, but a later use of force is not. The fact that there are more serious ways to violate Guidelines § 2H1.4, however, is insufficient to justify a departure in a "heartland" case. *United States* v. *LeBlanc*, 24 F.3d 340, 347

(1st Cir.), cert. denied 115 S. Ct. 250 (1994). When a heartland includes a range of conduct, some of which is more serious, the place within the range can reflect the gravity of the particular offense. That is generally the end of the analysis.

Of course, upward departure may be appropriate for those officers whose conduct is particularly heinous. See Guidelines § 5K2.8 (policy statement) (upward departure for extreme conduct). And, as the court of appeals recognized (Pet. App. 76a n.38), although ordinary victim misconduct does not warrant a departure in an excessive force case, unusual victim misconduct would be a candidate for departure. In this case, however, the district court's findings show that King engaged in ordinary, rather than unusual, misconduct. Pet. App. 70a. Notably, King did not attack or harm any officer. A downward departure for victim misconduct was unwarranted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1995

APPENDIX

1. Sections 3553(a) and (b), 18 U.S.C., provide:

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the

guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

2. Sections 3742(a)-(f), 18 U.S.C., provide:

§ 3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline

range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(9)

Supreme Court, U.S.
FILED
DEC 28 1995
CLERK

No. 94-8842

In The

Supreme Court of the United States

October Term, 1995

LAURENCE M. POWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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19 pp

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INTRODUCTION

The United States contends the circuit court correctly applied a de novo standard of review of the downward departures in this case and correctly found that all of the factors used by the district court were invalid factors.

The Government devotes a great deal of argument to its contention that appellate review of departures involve questions of law that call for a de novo standard of review.

In the abstract, of course, this Court has already held that sentencing appeals, in general, and departure appeals, in particular, involve questions of law. *Williams* v. *United States*, 503 U.S. 193 (1992).

Indeed, 18 U.S.C. § 3742(e) explicitly addresses sentences that are "imposed as a result of an incorrect application of the sentencing guidelines" or are "outside the applicable guideline range."

But, neither *Williams* nor Section 3742(e) support the Government position that where, as here, downward departures are based either on a ground that is specifically authorized by the Guidelines (victim provocation), or on a combination of factors not explicitly taken into account in the Guidelines (susceptibility to abuse in prison; unfair repetitive prosecution; the lack of danger to the community), the standard of appellate review is, or should be de novo.

In this Reply Brief, Petitioner Powell contends that when the Court is reviewing a departure under an authorized or encouraged basis for downward departure, Section 3742(e) requires a two-step process. First the

reviewing court must determine whether the ground for departure *could* legally be applied in a case of the sort before the court, and (if so), the court must then "accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." Petitioner contends this statutory mandate to the reviewing court applies the "due deference" standard to facts impliedly and explicitly found by the district court, and requires the reviewing court to defer to the district court's application of the downward departure guideline to the case unless the facts impliedly or explicitly found are clearly erroneous.

Where the departure is based on a factor or combination of factors not taken into account in the Guidelines, the reviewing court must first determine whether the district court erred, as a matter of law, in its conclusion that the Guidelines did not take the factor (or combination of factors) into account, or did not prohibit departure on that basis. If the district court did not err in that determination, then the same second step is mandated by Section 3742(e), last paragraph.

The Government makes several specific arguments Petitioner responds to, regarding particular sub-issues presented.

Finally, applying the above rules to the facts of this case, Petitioner concludes: (1) the District Court did not err as a matter of law in applying the victim misconduct downward departure guideline to a case of this type; (2) giving due deference to the district court's explicit and

implicit factual findings, none of which were clearly erroneous, the departure for victim misconduct in this case is reasonable and must be upheld; (3) while lack of recidivism is a factor which is individually prohibited as a basis for departure, where, as here, the defendant is in criminal history category I, neither "added punishment" due to the defendant's unusual susceptibility to abuse in prison, nor the additional punishment flowing from the successive prosecutions of the defendant for the same conduct are prohibited bases for downward departure, and neither are taken into account in the guidelines, and both are arguably related to the purposes of punishment mentioned in 18 U.S.C. § 3553(a)(2), so, in combination, they do not constitute an illegal, or invalid basis for departure; (4) applying the "due deference" standard found in the last paragraph of § 3742, the district court's three-level departure on this combined basis, although "outside the applicable guideline range"[1] is not unreasonable in light of the factors enumerated in 18 U.S.C. § 3553(a)(1)-(7) or the reasons stated by the district court and it must, also, be upheld.

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[1] This is the legal question on appeal identified in 18 U.S.C. § 3742(e)(3).

> "Upon review of the record, the court of appeals shall determine whether the sentence – (3) is outside the applicable guideline range, and is unreasonable, having regard for – (A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of 3553(c)."

ARGUMENT

On some level, it is clear a reviewing court is always entitled to determine whether or not the trial court correctly applied the law to the facts of the case.

A substantial portion of the Government's Brief ("Govt.") appears to be devoted to this proposition. It is also clear that if, e.g., a district court departs on the basis of a factor the Guidelines specifically state is a prohibited basis for departure, that would constitute an invalid basis of departure, as a matter of law, under 18 U.S.C. § 3742(e)(2).

Section 3742(e) governs review of district court sentencing decisions, and sets forth two standards that are non-controversial and appear to be legal standards appropriate for "de novo" review.

> "**(e) Consideration.** – Upon review of the record, the court of appeals shall determine whether the sentence –
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;
>
> (3) is outside the applicable guideline range, and is unreasonable, having regard for –
>
> (A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and
>
> (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

* * *

> The Court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." [Excerpt, § 3742]

Under this statute, when the Court imposes a sentence that is lower than a statutory mandatory minimum sentence, the sentence was "imposed in violation of law" pursuant to § 3742(e)(1). This is clearly a question of law, and de novo review is appropriate.

Similarly, when the district court intends to sentence within the appropriate guideline range, but errs in applying the guidelines to the facts, that error would appear to be an error of law, and after accepting the district court's findings of fact, which were not clearly erroneous; a de novo review of the application of the law to those facts would be required under Section 3742(e)(2).

Finally, since any departure is "outside the applicable guideline range" by definition, Section 3742(e)(3) would appear to apply.[2] This conclusion seems consistent with

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[2] Counsel is mindful of Justice O'Connor's opinion in *Williams* v. *United States, supra*, wherein it was held that the use of an invalid departure ground is an "incorrect application of the guidelines" however, that conclusion seems apt when the departure used is one that the Guidelines actually address – than where the question is whether or not the factor is taken into account by the Guidelines. Here, e.g., the downward departure of five levels was for victim misconduct, under U.S.S.G., Section 5K2.10 was more obviously an application of the Guidelines to

the use of language in 18 U.S.C. § 3553(b) which requires a sentence "within the range" unless there is present an aggravating or mitigating circumstance not taken into account, on the basis of which departure is justified.

Given this statutory scheme governing appellate review of sentences imposed by the district court, it seems clear that, contrary to the Government's conclusion, a two step approach is required.

In the case of a basis of departure that is explicitly authorized by the Guidelines, such as victim misconduct (U.S.S.G. § 5K2.10), the reviewing court must, of course, determine whether, as a matter of law, that Guideline could apply to the case before it. If, for example, the trial court departed downward for victim misconduct, in a case in which there was no victim, de novo review would enable the reviewing court to conclude, as a matter of law, that the district court departed on the basis of an invalid factor. If, on the other hand, the case is one in which, legally, a downward departure could be based on victim misconduct, the language of Section 3742(e) appears to mandate the reviewing court to give "due deference to the district court's application of the guidelines to the facts."

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the facts, than was the court's 3-level departure for a combination of non-prohibited factors. Nevertheless, Petitioner's analysis incorporates the holding of *Williams* that a departure is an application by the district court of the Guidelines to the facts of the case.

Here, Petitioner Powell has argued that since there was a victim, and since one major element of the sentencing formula under the Guidelines was the offense conduct constituting assault, and in any event it was a violent offense, U.S.S.G. § 5K2.10 can legally apply to this case.

The policy statement applicable to this basis for departure states in relevant part:

> "Victim misconduct ordinarily would not be sufficient to warrant applications of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses."

The Guidelines say nothing about "ordinary" misconduct of the victim of a violent offense, and they do not mention civil rights cases as a type of violent offense to which this type of departure would ordinarily not be applicable.

Contrary to the Government's (and the circuit court's) conclusion that this guideline authorizing downward departure for victim misconduct in cases of violent offenses would not apply in the case of "ordinary" victim misconduct, Petitioner contends the plain language of the Guideline section itself precludes a finding that the district court erred as a matter of law in applying this guideline to this case.

Moreover, the second step mandated by Section 3742 – reviewing the district court's application of the guideline to the particular facts of the case – is not a de novo review since that review must be undertaken with due

deference for the district court's findings of fact, and with "due deference to the district court's application of the guidelines to the facts."

The government suggests that a careful review of the district court's explicit findings involve a second error of law, since they do not state that the victim misconduct actually provoked the offense behavior.[3]

But, the Guideline itself (Section 5K2.10) does not require such a direct link. It merely states that the victim's wrongful conduct "contributed significantly to provoking the offense behavior."[4]

The Government seems to suggest that the victim misconduct must come at the precise point in time that the offense behavior occurs. This is not a fair reading of the Guideline, nor is it the way the Guideline was interpreted in *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989) discussed at length in the Opening Briefs.

The language of the Guideline *does* however suggest that the court should look to the offense *conduct* rather than the charge offense when determining whether to depart downward based on victim misconduct, since it specifically describes the relationship between the misconduct and the "offense behavior." Petitioner argued in the opening brief that the Commission specifically

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[3] Indeed, the Guideline does describe a necessary relationship between the misconduct and the offense behavior.

[4] Nor can there be any doubt that the District Court's departure in this case included implied findings sufficient to meet the government's test – that the victim misconduct provoked the offense conduct.

intended that where an offense is a violent offense, and where the sentence has an element based on assaultive conduct, the Guideline for that element of the sentence may overstate the seriousness of the crime where victim misconduct substantially contributes to provoking that assaultive conduct. The Government's response that civil rights offenses are "both different from and more serious than the underlying conduct by itself" (Govt. p. 46) is not a persuasive reason for accepting the conclusion that this guideline does not permit downward departure if there is victim misconduct in a civil rights case.

First, it is clear that the degree to which a civil rights case is more serious than the underlying aggravated assault is reflected by the Guidelines sentence which adds additional levels to the sentence because of the civil right violation to the offense level given for aggravated assault. Second, and perhaps more important, the departure in this case for victim misconduct which was 5 levels did not exceed the 15 levels in the guidelines sentence that were based on the offense conduct of aggravated assault. The remaining levels attributable to, and reflecting the fact that a civil rights violation is more serious than an ordinary aggravated assault remained intact on the district court's analysis of this departure issue.

In other words, the applicable guideline sentence is made up of various elements. Fifteen levels of that sentence are solely for aggravated assault, which was added to the offense level of 6 for the civil rights violation. The "base" offense level in this case was thus based on a combination of two elements – the civil rights violation element and the aggravated assault element.

The 5-level downward departure applied by the district court was for victim misconduct that substantially contributed to provoking the offense conduct of aggravated assault. That departure left intact the additional 6-levels in the Guidelines sentence that specifically respond to the difference and greater seriousness of this offense (civil rights violation) when compared to ordinary aggravated assault. Had the downward departure been applied to an ordinary aggravated assault case, the resulting offense level[5] would have been 10, where as here, because this was a civil right violation the resulting offense level[6] was 16.

Nothing in the Guidelines, or the sentencing statute supports the conclusion that a reviewing court may determine that certain victim misconduct is "ordinary" and therefore ineligible for the departure. In fact, it is clear that civil rights violations need not involve violent offense conduct at all, and there is no reason to believe that when they do, victim misconduct is irrelevant to the ultimate sentencing decision of the district court.

The Government's suggestion that "although ordinary victim misconduct does not warrant a departure in an excessive force case, unusual victim misconduct would be a candidate for departure" (Govt. p. 47) finds no support in the Guidelines or in logic.

Rather than engaging in a review of the departure with due deference to the district court's application of

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[5] Exclusive of adjustments for use of a weapon and injury, which are the same in either case.

[6] Exclusive of the other adjustments.

the guidelines to the facts of this case, the government has created from whole cloth a new legal requirement that precludes the application of U.S.S.G., Section 5K2.10 unless the record discloses "unusual victim misconduct." But the government's approach ignores the fact that the Commission specifically identified "victim misconduct" as an authorized basis for departure in violent offense conduct cases, and attempts to engraft general "heartland" principles onto this explicit section of the guidelines. Nothing in statutory law, or the guidelines themselves supports this approach.

Applying 18 U.S.C. § 3742(e) to this departure, giving the mandated "due deference" to the district court's application of U.S.S.G. § 5K2.10 to the facts of this case, the 5-level downward departure for victim misconduct must be affirmed.[7]

Similarly, an application of Section 3742(e) to the present case rebuts the government's contention that the circuit court should review de novo a particular departure decision when it is based on a combination of factors.

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[7] The Government concedes that 18 U.S.C. § 3742(e) requires appellate courts to accept district court findings of fact unless they are clearly erroneous, and to "give due deference to a district court's application of the guidelines to the facts." Yet the Government completely ignores this "due deference" requirement when discussing the district court's application of Guidelines Section 5K2.10 to the facts of this case, and engages in an analysis that leads the Government to conclude that "ordinary victim misconduct" (which has no definition in the law) "is not a mitigating factor" and that since here the victim misconduct is "ordinary" the 5-level downward departure for victim misconduct was illegal!

Here the district court identified three factors that it believed were not, in and of themselves valid grounds for departure standing alone, but in combination did justify a further 3-level downward departure.

Section 3742(e)(2) and (3) are applicable since the resulting sentence was "outside the applicable guideline range." Those sub-sections require the reviewing court to determine whether the sentence was the result of an incorrect application of the sentencing guidelines, and if it is outside the applicable guideline range, whether it was unreasonable, having regard for various factors.

Clearly, although individually, the factors may not have all been permitted bases for departure, two of the three factors – added punishment due to unusual susceptibility to abuse in prison and added punishment due to successive, high visibility criminal prosecutions for the same offense conduct – are neither adequately taken into account by the Guidelines themselves, nor prohibited grounds for departure.[8]

Nor can it be said that these factors fail to meet the purposes of the sentencing law, as required by Section 3742(e)(3)(A). In fact, the three bases for downward

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[8] Arguably, the defendant's lack of danger to the community is, standing alone, a prohibited ground for downward departure since his is in criminal history category I and the Guidelines already assume the lowest level of recidivism in that category. On the other hand, the District Court may have been thinking of non-criminal dangers that the "heartland" offender in a violent assault case might pose to the community. The Court specifically noted the defendant's were not bullies or offensive people in the civilian lives.

departure appear to fit easily into the 4 goals of sentencing the Government considers to be the touchstone of valid departures found in 18 U.S.C. § 3553(a)(2).[9] Subsection 3553(a)(2)(A) includes a goal of "to provide just punishment for the offense." When punishment is harder or more painful, or *more* retributive on one prisoner than another, it is reasonable that it should be shorter for that prisoner, or that it will take less of it to have the same punitive effect. Sub-section 3553(a)(2)(B) refers to deterrence, and it seems logical and reasonable for a District Court to conclude that living in prison with a constant, reasonable, fear of abuse will have a greater deterrent effect than merely living in prison without such a fear. Sub-section 3553(a)(2)(C) involves protection of the public from "further crimes" of the defendant, and to the extent this factor may be considered at all for a first offender, its relationship to deterrence appears to favor

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[9] The Government reads the list as fairly short. At p. 15 of their brief, the Government states:

> "Even if the Commission has not adequately considered a factor, a downward departure is permissible only when it is a 'mitigating' factor, consistent with the purposes of sentencing identified is 18 U.S.C. § 3553(a)(2), *i.e.*, retribution, deterrence, incapacitation and rehabilitation. The question whether a particular departure ground satisfies those statutory requirements is subject to de novo appellate review." (Govt., pp. 15-16).

Petitioner observes that what the government calls "retribution" under sub-section 3553(a)(2)(A) for example, includes the promotion of respect for the law, and to provide for "just punishment." Obviously, being placed by the court in a situation where the prisoner is likely to be the victim of law violations neither promotes respect for the law, nor is "just."

this ground for departure. Finally, sub-section 3553(a)(2)(D), which refers to rehabilitation virtually always favors downward departure, but would tend to favor accelerating the defendant's movement into a half-way house or community confinement center where, presumably, there would be a lowering of the risk of abuse in prison, and thus an increase in the ability of incarceration to be used in an effective rehabilitative manner.

These are clearly the aspects of this case the district court had in mind when bundling three "added punishment" factors into a single, combination ground for downward departure. Yet the government's approach would require reviewing courts to substitute their judgement for trial courts in determining whether such factors, which are non-prohibited (in combination) and which serve the goals of punishment, are "appropriate" in a given case.

Neither Section 3742(e) nor any of this Court's decisions justify such a de novo review, and the requirement of "due deference to the district court's application of the guidelines to the facts" supports the contrary view.[10]

Unless the district court identifies a ground for departure that is prohibited, or that does not serve the purposes of punishment, the circuit court's de novo

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[10] Another way of looking at this issue is this. If the question whether the "application of the sentencing guidelines" was "correct" or not is a question of law in departure cases (*Williams* v. *United States, supra*), then the Section 3742(e)(3) question of whether or not the departure is reasonable in a particular case in view of the goals of sentencing and the reasons of the district court requires the reviewing court to defer.

review will not permit reversal of the departure. Unless the district court's fact finding is clearly erroneous, or its reasoning an abuse of discretion, the circuit court's deference to the district court's application of the guidelines to the facts will require the departure be affirmed.[11]

CONCLUSION

The Government simply exhorts a claimed devotion to eliminating disparity in sentences over the actual goals of the Guidelines and the Sentence Reform Act which include an intent to mete out just punishment, roughly proportionate sentences, and to retain a degree of individualized sentencing, where the district court, with its unique vantage point, identifies unique factors in the case before it which serve the statutory goals of sentencing, and are mitigating factors either specifically authorized by the Guidelines as grounds for departure, or at least are non-prohibited and not otherwise accounted for, or adequately accounted for in the Guidelines.

The circuit court's role is, like the district court's role limited under the Sentence Reform Act.

It reviews de novo the category of departure used by the district court to determine if an error of law was made in considering that ground in the type of case before it. If not, the circuit court must revert to a deferential role, affirming explicit and implicit findings of fact, unless clearly erroneous, and deferring to the district

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[11] Clearly, under *Williams*, a departure is an instance of "the district court's application of the guidelines to the facts."

court's application of the guidelines to those facts (departing) unless the departure is unreasonable, and thus an abuse of discretion.

In the present case the district court did not err as a matter of law in following the plain language of U.S.S.G. § 5K2.10 (victim misconduct) and if the district court's application of that guideline to the facts of this case is given the statutorily mandated "due deference" the 5-level departure therefor will be affirmed. Similarly, since at least two of the three "combination" factors upon which the district court relied are neither prohibited nor accounted for in the Guidelines, and since they serve the goals of sentencing as required by 18 U.S.C. § 3742(e), the district court neither erred as a matter of law in determining it could depart in this type of case on the basis of those combined factors, nor did it abuse its discretion (i.e., act unreasonably) in determining to grant an additional 3-level downward departure.

For all the foregoing reasons, the judgment of the court of appeals reversing the sentence should be reversed.

Respectfully submitted this 28th day of December, 1995.

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